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# MEDIA VIOLENCE AND THE OBSCENITY EXCEPTION TO THE FIRST AMENDMENT

Kevin W. Saunders\*

## I. INTRODUCTION

The public has grown uncomfortable with the depictions of violence now so prevalent in the entertainment media.<sup>1</sup> The now familiar statistics show that by the time a child, who watches two to four hours of television per day, is twelve, the child has observed 8,000 murders and 100,000 other acts of violence.<sup>2</sup> There is growing concern that this exposure to violence fuels the violence that seems to be becoming more common in our society.<sup>3</sup>

Congress has begun, once again,<sup>4</sup> to study the issue of violence in media. In recent hearings, the heads of the major television networks were

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<sup>1</sup> See, e.g., John Dillin, *Senate Hearings Lambaste High Level of TV Violence*, CHRISTIAN SCI. MONITOR, June 10, 1993, at 1 ("Top entertainment officials are under mounting pressure from lawmakers and the public to rid both TV and movies of excessive violence."); Editorial, *Getting a Handle on Video Violence*, ATLANTA J. & CONST., June 3, 1993, at A12 ("Increasingly, Americans want more control over the degree of violence their children see on TV and are exposed to through video games."); Robert L. Jackson, *TV Execs Vow Stronger Effort to Reduce Violence*, L.A. TIMES, May 22, 1993, at F2 ("Television executives, under pressure from Congress to reduce violence in programs seen by children, pledged Friday to work harder to reduce depictions of mayhem that often are imitated by young viewers.").

<sup>2</sup> See Dillin, *supra* note 1, at 1.

<sup>3</sup> See *id.* (reporting Senate hearing comment of Senator Simon) ("I'm not suggesting television is the cause of violence in our society. But it is a cause.' He says scientific research proves a direct link between criminal behavior and screen violence. 'We know that to be a fact,' he says." ); see also *infra* notes 439-43 and accompanying text.

<sup>4</sup> In 1969 the National Commission on the Causes and Prevention of Violence found a link between television violence and aggressive behavior. See *infra* notes 439-43 and accompanying text. The issue of the relationship between crime or horror comic books and violence also has drawn the attention of Congress. See *Hearings Before the Subcomm.*

called before the Senate Judiciary Committee to answer for their depictions of murder and mayhem.<sup>5</sup> Congress clearly will consider some controls on media depictions of violence if the media themselves do not exercise self-control.<sup>6</sup>

Thus far, Congress has been rather timid in its actions. It enacted the Television Program Improvement Act of 1990,<sup>7</sup> but the Act provides only an exemption from antitrust laws for any industry discussion or agreement to limit violent material on television,<sup>8</sup> without requiring any such limits. In a more recent effort, bills were introduced in both houses of Congress calling for the establishment of a "Television Violence Report Card."<sup>9</sup> These bills require only that the Federal Communications Commission evaluate and rate the violence on television programs and rate sponsors on the violence of the programs on which they advertise. Although the results would be published in the *Federal Register*, there is no provision, other than potential public reaction to the reports, for decreasing the violent content of the television fare. Another bill goes somewhat further and would require that warnings as to the nature of the material about to air accompany any broadcast of violent material.<sup>10</sup> Even this bill would not limit violence but would, at least, provide some opportunity for parents to control the exposure of their children to such material.

Congress' unwillingness to take direct action to limit depictions of violence in the media may be explained by first amendment concerns. Certainly, the entertainment industry has shown little reluctance to claim the protection of the amendment. As Jack Valenti, President of the Motion Picture Association of America, warned the Senate Judiciary Committee, "If you push and shove people, they're going to shove back. And remember, they have the armor of a thing called the 1st Amendment."<sup>11</sup>

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*to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 83d Cong., 2d Sess. (1954).

<sup>5</sup> *Oversight Hearing on the Television Program Improvement Act of 1990 Before the Senate Subcomm. on the Constitution*, 103d Cong., 1st Sess. (1993); *Oversight Hearing on the Television Program Improvement Act of 1990 Before the Subcomm. on the Constitution and Subcomm. on Juvenile Justice Joint Hearing*, 103d Cong. 1st Sess (1993).

<sup>6</sup> See, e.g., Jackson, *supra* note 1 ("At a House hearing earlier this month, several members of Congress signaled a growing impatience with the industry's effort to police itself. Even Congressional liberals who traditionally oppose censorship have said government restraints may be enacted." ).

<sup>7</sup> 47 U.S.C. § 303c (1992).

<sup>8</sup> 47 U.S.C. § 303c(c) (1992).

<sup>9</sup> S. 973, 103d Cong., 1st Sess. (1993); H.R. 2159, 103d Cong., 1st Sess. (1993).

<sup>10</sup> S. 943, 103d Cong., 1st Sess. (1993).

<sup>11</sup> Editorial, *Protected Violence*, CHI. TRIB., June 14, 1993, at 15 (quoting Mr. Valenti's comments to the Senate Judiciary Committee).

Thomas Murphy, Chairman of Capital Cities/ABC similarly invoked constitutional protection: "[T]he government must exercise restraint in interfering with the content of the programming the media portrays. Our founding fathers had the wisdom to recognize the importance of freedom of expression to democratic self-governance. We must guard the freedom zealously."<sup>12</sup>

At least one member of the Federal Communications Commission seems willing to take more direct action. Commissioner James Quello has suggested that the application of the FCC's approach to the broadcast of indecent material be carried over to violent material.<sup>13</sup> The FCC's regulatory authority to channel violent material into hours when children are unlikely to be in the viewing audience would seem established under *F.C.C. v. Pacifica Foundation*.<sup>14</sup> Although *Pacifica* did involve the broadcast of words referring to sexual and excretory activities, common subject matters of obscenity doctrine, the broadcast was not obscene but merely indecent.<sup>15</sup> The same factors that justified the channeling of indecent, nonobscene sexual and excretory references,<sup>16</sup> the pervasive presence of the broadcast media, its invasion of the home, and its accessibility to young children,<sup>17</sup> could justify the channeling of indecently violent material.<sup>18</sup>

Even if violent material were channeled into time slots not likely to draw an audience of children, problems still remain. We may not be quite as concerned about the exposure of eighteen year-olds to nonobscene, but indecent, sexual material as we are with the exposure of young children to such material. Individuals in their late teens and early twenties, however, may present great concerns with regard to exposure to violent material. Although channeling might protect children in their formative years, it would not prevent the exposure of such material to young adults, whose appetite for violence may be increased<sup>19</sup> or who may be led to imitate the

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<sup>12</sup> Jackson, *supra* note 1, at F2 (quoting Mr. Murphy's comments to the Senate Judiciary Committee).

<sup>13</sup> *F.C.C. Chief Backs T.V. Violence Laws, Consumer Group Seeks Limits, Especially in Kids' Hours*, CHI. TRIB., Mar. 14, 1993, at 9.

<sup>14</sup> 438 U.S. 726 (1978).

<sup>15</sup> *Id.* at 741.

<sup>16</sup> *Id.* at 762 (Powell, J., concurring).

<sup>17</sup> *Id.*

<sup>18</sup> *Pacifica* would not support the channeling of violent material if it is read to require the same focus on sex and excretion contained in the obscenity cases. Nonetheless, the thesis of this Article is that violent material can be obscene based solely on its level of violence. Such a conclusion would justify a total ban and thus would justify channeling.

<sup>19</sup> See *infra* notes 439-43 and accompanying text.

action.<sup>20</sup> Furthermore, even with the broadcast media channeled, there remain the problems of cable programming, movies, and even comic books.<sup>21</sup>

Several states also have attempted to limit access to materials depicting violence.<sup>22</sup> Those states have, however, limited their attempts to controlling access by minors. Such limitations to minors may be based on a political or philosophical unwillingness to censor materials made available to the adult population, but they also may be based on a belief that a general ban on violent material would be unconstitutional.

Missouri is among the states that have imposed such a ban.<sup>23</sup> The Missouri approach was to mirror the *Miller v. California*<sup>24</sup> test for obscenity,<sup>25</sup> with violence substituted for sex and with the insertion, where called for, of "under the age of seventeen."<sup>26</sup> Thus, the appeal to the

<sup>20</sup> See, e.g., Stephanie J. Berman, Comment, *View at Your Own Risk: Gang Movies and Spectator Violence*, 12 LOY. L.A. ENT. L.J. 477 (1992) (detailing incidents in which gang violence arguably has been triggered by gang movies).

<sup>21</sup> Comic books were the focus of much early concern over violent material. See Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1290-91 (1978); Note, *Crime Comics and the Constitution*, 7 STAN. L. REV. 237, 237-38, 248-51 (1955).

<sup>22</sup> See Jassalyn Hershinger, Note, *State Restrictions on Violent Expression: The Impropriety of Extending an Obscenity Analysis*, 46 VAND. L. REV. 473 (1993).

<sup>23</sup> MO. REV. STAT. § 573.090 (Supp. 1992).

<sup>24</sup> 413 U.S. 15 (1973).

<sup>25</sup> *Id.* at 24.

<sup>26</sup> MO. REV. STAT. § 573.090 (Supp. 1993) provides:

Video cassettes, morbid violence, to be kept in separate area—sale or rental to persons under seventeen prohibited, penalties

1. Video cassettes or other video reproduction devices, or the jackets, cases or coverings of such video reproduction devices shall be displayed or maintained in a separate area if the same are pornographic for minors as defined in section 573.010, or if:

(1) Taken as a whole and applying contemporary community standards, the average person would find that it has a tendency to cater or appeal to morbid interest in violence for persons under the age of seventeen; and

(2) It depicts violence in a way which is patently offensive to the average person applying contemporary adult community standards with respect to what is suitable for persons under the age of seventeen; and

(3) Taken as a whole, it lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen.

2. Any video cassettes or other video reproduction devices meeting the description in subsection 1 of this section shall not be rented or sold to a person under the age of seventeen years.

3. Any violation of the provisions of subsection 1 or 2 of this section shall be punishable as an infraction, unless such violation constitutes furnishing pornographic materials to minors as defined in section 573.040, in which case it shall be

prurient interest aspect of the *Miller* test becomes “appeal to morbid interest in violence for persons under the age of seventeen,”<sup>27</sup> and the serious value aspect becomes “[t]aken as a whole, it lacks serious literary, artistic, political, or scientific value for persons under the age of seventeen.”<sup>28</sup>

Tennessee<sup>29</sup> also has adopted a statute restricting the dissemination of violent material to minors, and Colorado<sup>30</sup> has adopted a similar one as

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punishable as a class A misdemeanor or class D felony as prescribed in section 573.040, or unless such violation constitutes promoting obscenity in the second degree as defined in section 573.030, in which case it shall be punishable as a class A misdemeanor or class D felony as prescribed in section 573.030.

<sup>27</sup> *Id.* § 573.090(1)(1).

<sup>28</sup> *Id.* § 573.090(1)(3).

<sup>29</sup> TENN. CODE ANN. § 39-17-911 (1993) provides:

Sale, loan or exhibition of material to minors.

(a) It is unlawful for any person to knowingly sell or loan for monetary consideration or otherwise exhibit or make available to a minor:

(1) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body, which depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors; or

(2) Any book, pamphlet, magazine, printed matter, however reproduced, or sound recording, which contains any matter enumerated in subdivision (a)(1), or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors.

(b) It is unlawful for any person to knowingly exhibit to a minor for monetary consideration, or to knowingly sell to a minor an admission ticket or pass or otherwise admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct, excess violence, or sado-masochistic abuse, and which is harmful to minors.

(c) A violation of this section is a Class A misdemeanor.

(d) It is an affirmative defense to prosecution under this section that the minor to whom the material or show was made available or exhibited was, at the time, accompanied by his parent or legal guardian, or by an adult with the written permission of the parent or legal guardian.

TENN. CODE ANN. § 39-17-914 (1993) provides:

Display for sale or rental of material harmful to minors.

(a) It is unlawful for a person to display for sale or rental a visual depiction, including a videocassette tape or film, or a written representation, including a book, magazine or pamphlet, which contains material harmful to minors anywhere minors are lawfully admitted.

<sup>30</sup> COLO. REV. STAT. ANN. § 18-7-601 (West 1992) provides:

Dispensing violent films to minors—misdemeanors

well. The Tennessee statute groups excessively violent material with sexually explicit material and bans the dissemination of either to minors.<sup>31</sup> The Colorado statute, like Missouri's, employs a scheme similar to that of *Miller*. Colorado, however, limits its ban on violent material to "work [that] depicts or describes, in a patently offensive way, repeated acts of actual, not simulated, violence resulting in serious bodily injury or death."<sup>32</sup>

The states' attempts to limit media depictions of violence, even though limited to minors, have not been well received by the courts. The Missouri statute was challenged in *Video Software Dealers Association v. Webster*.<sup>33</sup> The district court held that even violent material enjoys first amendment protection and that any ban would have to meet strict scrutiny by being narrowly tailored to promote a compelling state interest.<sup>34</sup> Furthermore, the court rejected the argument that violent material is obscene, stating that "[u]nlike obscenity, violent expression is protected by the First Amendment."<sup>35</sup> The affirming Eighth Circuit opinion also required that the state show that the statute was narrowly drawn to advance an articulated, compelling governmental interest and that its means were carefully tailored to achieve that purpose.<sup>36</sup> The court specifically rejected the argument that violence is obscene, stating that obscenity encompasses only sexual conduct.<sup>37</sup> The aspects of the Tennessee statute addressing violence also were declared unconstitutional. The state supreme court, in

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(1) No person shall sell, rent, or otherwise furnish to a minor any video tape, video disc, film representation, or other form of motion picture if:

(a) The average person, applying contemporary community standards, would find that the work, taken as a whole, predominantly appeals to the interest in violence; and

(b) The work depicts or describes, in a patently offensive way, repeated acts of actual, not simulated, violence resulting in serious bodily injury or death; and

(c) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(2) For the purposes of this section, "minor" means any person under eighteen years of age, and "serious bodily injury" shall be defined as provided in section 18-1-901(3)(p).

(3) Any person who violates subsection (1) of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of one thousand dollars; except that, for a second or subsequent offense, the fine shall be five thousand dollars.

<sup>31</sup> TENN. CODE ANN. § 39-17-914(a)(1)-(2).

<sup>32</sup> COLO. REV. STAT. ANN. § 18-7-601(1)(b).

<sup>33</sup> 773 F. Supp. 1275 (W.D. Mo. 1991), *aff'd*, 968 F.2d 684 (8th Cir. 1992).

<sup>34</sup> *Id.* at 1277.

<sup>35</sup> *Id.* at 1278.

<sup>36</sup> *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

<sup>37</sup> *Id.* at 688.

*Davis-Kidd Booksellers, Inc. v. McWhorter*,<sup>38</sup> found the statutory definition of “violence” unconstitutionally vague and also restricted the term “obscene” to sexually explicit materials. The Colorado statute has not been challenged, and given its limitation to actual violence, may not be.

The thesis of this Article is that the First Amendment should not stand in the way of attempts to regulate the depiction of violence. Not only may the FCC and Congress channel the broadcast media’s use of violent material, but Congress may ban it altogether. Likewise, state attempts to restrict access of minors to violent material also should be held constitutional. Furthermore, the states should not be limited to controlling access by minors. States should have the authority to ban completely the dissemination of excessively violent material.

The insistence by the Supreme Court that for material to be obscene it must be erotic, is misguided. History and policy provide even better justification for holding excessively violent material to be outside of the protection of the First Amendment than they do for withholding such protection from excessively sexual material. Such violent material should be unprotected solely due to its violent content, without need for any inquiry into its sexual content.

The argument is comparative. The position that “Congress shall make no law . . . abridging the freedom of speech, or of the press”<sup>39</sup> means “no law,” at least in the context of obscenity,<sup>40</sup> is reasonable, but it has failed to carry the day. This Article simply argues that if sufficiently explicit sexual material is not afforded the protection of the First Amendment, there are equal or better arguments for denying that protection to excessively violent material.

The Article will first present the Supreme Court’s development of the current law of obscenity and its insistence on eroticism. An examination of the statutory and case law history used to justify that position then will show that its adequacy to justify the doctrine is no stronger than statutory and case law history in favor of a ban on violence. In addition to legal history within the United States and its predecessor colonies, other legal and extralegal definitions and concepts of obscenity will be examined. The Article then shows that the policy reasons commonly offered in support of banning sexually obscene material provide even better justification for a ban on excessively violent material. Lastly, the issue of drafting a violent

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<sup>38</sup> 866 S.W.2d 520 (Tenn. 1993).

<sup>39</sup> U.S. CONST. amend. I.

<sup>40</sup> See, e.g., *Roth v. United States*, 354 U.S. 476, 508-14 (1957) (Douglas, J., dissenting) (arguing that the majority’s test for obscenity is too broad and gives judges and juries too much discretion to censor).



obscenity statute will be addressed with special attention paid to issues regarding depictions of violence aimed at young children.

## II. THE SUPREME COURT ON OBSCENITY, SEX, AND VIOLENCE

The statement that case law and statutory history do not focus solely on the erotic as obscene clearly would be false, if limited to recent history. With few exceptions,<sup>41</sup> modern obscenity statutes address materials depicting sexual or excretory activities. Such a theme is, in fact, dictated by Supreme Court decisions consistently stating that obscenity is so limited.

The genesis of constitutional obscenity law is found in *Roth v. United States*.<sup>42</sup> Although the Court in *Roth* noted that earlier decisions had assumed obscene material was not protected by freedom of speech or freedom of the press,<sup>43</sup> in *Roth* the Court directly addressed the question. After a consideration of the history of obscenity statutes,<sup>44</sup> the Court concluded that "obscenity is not within the area of constitutionally protected speech or press."<sup>45</sup>

The Court then went on to define obscene material as "material which deals with sex in a manner appealing to prurient interest."<sup>46</sup> The Court further defined material appealing to the prurient interest as "material having a tendency to excite lustful thoughts,"<sup>47</sup> and "prurient" as "[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . . ."<sup>48</sup> The Court said that the resultant formulation was not significantly different from the Model Penal Code approach, which classifies material as obscene "if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of

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<sup>41</sup> See *infra* notes 205-45, 293-337 and accompanying text.

<sup>42</sup> 354 U.S. 476 (1957).

<sup>43</sup> *Id.* at 481 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1953); *Winters v. New York*, 333 U.S. 507, 510 (1948); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *Hoke v. United States* 227 U.S. 308, 322 (1913); *Public Clearing House v. Coyne*, 194 U.S. 497, 508 (1904); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897); *United States v. Chase*, 135 U.S. 255, 261 (1890); *Ex Parte Jackson*, 96 U.S. 727, 736-37 (1877)).

<sup>44</sup> See *infra* notes 56-176 and accompanying text.

<sup>45</sup> *Roth*, 354 U.S. at 485.

<sup>46</sup> *Id.* at 487 (footnote omitted).

<sup>47</sup> *Id.* at 487 n.20.

<sup>48</sup> *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1949)).

candor in description or representation of such matters.”<sup>49</sup> The Court’s focus on sex and excretion thus was established.

Later cases have been consistent in their application of obscenity doctrine only to material with a sexual or excretory focus.<sup>50</sup> The insistence on such content is best seen in *Cohen v. California*.<sup>51</sup> Although the four letter commentary on the draft displayed on Cohen’s jacket may have been offensive, the Court said that it could not be obscene because “such [obscene] expression must be, in some significant way, erotic.”<sup>52</sup>

The limitation to sexual material also is seen in the current *Miller v. California*<sup>53</sup> test of obscenity. Under that test, a finding of obscenity depends upon:

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>54</sup>

This Article does not deny that the current focus of obscenity doctrine is on the depiction of sexual or excretory activities. Rather, the claim is that such focus, to the exclusion of the consideration of violent material, is unwarranted. Pre-*Roth* history provides as good a basis for banning depictions of violence as obscene as it does for banning depictions of sexual activities as obscene.

#### A. *The Supreme Court’s History of Obscenity Law as Presented in Roth*

In claiming that the historical basis for concluding that excessively violent material may constitutionally be banned is as good as, or better than, the historical basis for a ban on sexually explicit material, the test implied is rather easy to meet. The Court’s history, relied upon in *Roth*, provides broad, general support for the conclusion reached in that case, support that does not distinguish sex from violence.

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<sup>49</sup> *Id.* (quoting MODEL PENAL CODE § 207.10(2) (Tentative Draft No. 6, 1957)).

<sup>50</sup> *See, e.g.,* *Pope v. Illinois*, 481 U.S. 497 (1987); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Miller v. California*, 413 U.S. 15 (1973); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

<sup>51</sup> 403 U.S. 15 (1971).

<sup>52</sup> *Id.* at 20.

<sup>53</sup> 413 U.S. 15 (1973).

<sup>54</sup> *Id.* at 24 (citations omitted).

The opinion in *Roth* begins by noting that the freedoms of speech and the press were never considered absolute and that at the time of the Bill of Rights, libel could be prosecuted.<sup>55</sup> The Court also cited to statutes on blasphemy or profanity that predate the Bill of Rights<sup>56</sup> and quoted a Massachusetts statute of the era making it criminal to publish “‘any filthy, obscene, or profane song, pamphlet, libel or mock sermon’ in imitation or mimicking of religious services.”<sup>57</sup> The Massachusetts statute was said to show that profanity and obscenity were related offenses.<sup>58</sup> The claimed showing of such a relation appears to be an attempt to strengthen the slender reed that a single statute would provide to support a claim that obscenity was punishable prior to the Bill of Rights. The relationship said to be found in the Massachusetts statute seems designed to turn the other statutes and cases cited into obscenity law.

Although the Court did manage to cite statutes from each of the other twelve colonies and from Vermont, those other statutes and the *Ruggles* case from New York did not concern obscenity. Connecticut’s *Act for the Punishment of Divers Capital and Other Felonies*<sup>59</sup> is a blasphemy statute making it illegal “wilfully to blaspheme the Name of God the Father,

<sup>55</sup> *Roth v. United States*, 354 U.S. 476, 482 (1957).

<sup>56</sup> See *id.* at 482 n.12 (citing *Act for the Punishment of Divers Capital and Other Felonies*, 1784 Conn. Pub. Acts 66, 67; 1737 *Act Against Drunkenness, Blasphemy*, §§ 4, 5, 1797 Del. Laws 173, 174; 1786 *Act to Regulate Taverns*, Digest of the Laws of Ga. 512, 513 (Prince 1822); *Act of 1723*, ch. 16, § 1, Digest of the Laws of Md. 92 (Herty 1799); 1646 Mass. Bay General Laws & Liberties, ch. XVIII, § 3, 1814 Mass. Bay Colony Charters & Laws 58; *Act of 1782*, ch. 8, 1836 Mass. Rev. Stat. 741, § 15; *Act of 1798*, ch. 33, §§ 1, 3, 1836 Mass. Rev. Stat. 741, § 16; 1791 *Act for the Punishment of Certain Crimes Not Capital*, 1792 N.H. Laws 252, 256; 1791 *Act for the Punishment of Profane Cursing and Swearing*, 1792 N.H. Laws 258; 1798 *Act for Suppressing Vice and Immorality*, §§ VIII, IX, 1800 N.J. Rev. Laws 329, 331; 1788 *Act for Suppressing Immorality*, § IV, 2 N.Y. Laws 257, 258 (Jones & Varick 1777-1789); 1741 *Act . . . for the More Effectual Suppression of Vice and Immorality*, § III, 1 N.C. Sess. Laws 52 (Martin Rev. 1715-1790); 1700 *Act to Prevent the Grievous Sins of Cursing and Swearing*, II Pa. Statutes at Large 49 (1700-1712); 1794 *Act for the Prevention of Vice and Immorality*, § II, 3 Pa. Laws 177, 178 (1791-1802); 1798 *Act to Reform the Penal Laws*, §§ 33, 34, 1798 R.I. Pub. Laws 584, 595; 1703 *Act for the More Effectual Suppressing of Blasphemy and Prophaneness*, 1790 S.C. Laws 4; 1797 *Act, for the Punishment of Certain Capital, and Other High Crimes and Misdemeanors*, § 20, 1 Vt. Laws 332, 339 (Tolman 1808); 1797 *Act, for the Punishment of Certain Inferior Crimes and Misdemeanors*, § 20, 1 Vt. Laws 352, 361 (Tolman 1808); 1792 *Act for the Effectual Suppression of Vice*, § 1, 1794 Va. Acts 286; *People v. Ruggles*, 8 Johns. 290 (N.Y. 1811).

<sup>57</sup> *Id.* at 483 (quoting 1712 Mass. Bay Acts & Laws, ch. CV, § 8, 1814 Mass. Bay Colony Charters & Laws 39).

<sup>58</sup> *Id.*

<sup>59</sup> 1784 Conn. Pub. Acts 66, 67.

Son, or Holy Ghost, either by denying, cursing or reproaching the true God or his Government of the World."<sup>60</sup>

Delaware's *An Act Against Drunkenness, Blasphemy; and to Prevent the Greivous Sins of Prophane Cursing, Swearing and Blasphemy*<sup>61</sup> might appear from its title's inclusion of profanity to be more on point, but it too was aimed at preserving sanctity, of government as well as of religion. Section four made it illegal for "any person within this government . . . prophanelly [to] swear, by the name of God, Jesus Christ, or the Holy Spirit, or curse himself or any other person."<sup>62</sup> Section five, not so limited to members of the Government, punished blasphemy by the pillory, branding on the forehead, and thirty-nine lashes.<sup>63</sup>

Georgia's statute was less specific in the nature of the profanity it barred. Its *An Act to Regulate Taverns, and to Suppress Vice and Immorality*<sup>64</sup> imposed fines against anyone taking a profane oath or trading with slaves without a permit.

The Maryland statute again shows the colonial concern with blasphemy. Illegal under the act was:

blaspheming or cursing God, or . . . denying our Saviour Jesus Christ to be the son of God, or denying the Holy Trinity, or the Godhead of any of the Three Persons, or of the Unity of the Godhead, or . . . uttering any profane words concerning the Holy Trinity or any of the persons thereof . . . .<sup>65</sup>

Penalties ranged from fine or imprisonment on the first offense, the addition of a forehead brand on the second, to death, without benefit of clergy, on the third offense.<sup>66</sup>

In addition to the Massachusetts law using the word "obscene," the Court cited three other Massachusetts statutes. The first, titled *Blasphemy*, made it illegal to:

blaspheme the holy name of God, Father, Son, or Holy Ghost, with direct, presumptuous, or high handed blasphemy, either by wilful or obstinate denying the true God,

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<sup>60</sup> *Id.*

<sup>61</sup> 1 Del. Laws 173, 174 (1797).

<sup>62</sup> *Id.* § 4.

<sup>63</sup> *Id.* § 5.

<sup>64</sup> Digest of the Laws of Ga. 512, 513 (Prince 1822).

<sup>65</sup> Act of 1723, ch. 16, § 1, Digest of the Laws of Md. 92 (Herty 1799).

<sup>66</sup> *Id.*

or his creation, or government of the world, or . . . curse God in like manner, or reproach the holy religion of God, as if it were but a politick device . . . or . . . utter any other kind of blasphemy of the like nature and degree . . . .<sup>67</sup>

The focus again is clearly on the protection of religious sensibilities. Other sections prohibit idolatry and witchcraft, and the penalty for violation is death.<sup>68</sup> Interestingly, the citations of authority accompanying the various sections are all biblical.<sup>69</sup> Again there is no indication that the statute is aimed at the depiction of sexual acts.

The second statute, titled *An Act Against Blasphemy*,<sup>70</sup> is once again clearly aimed at the protection of religion. The statute does address cursing but only bars cursing God, Jesus Christ, or the Holy Ghost.<sup>71</sup> Further banned is exposing to contempt and ridicule any of the books, all presented by name in the statute, of the Old or New Testament.

The last Massachusetts statute cited would appear from its title, *An Act to Prevent Profane Cursing and Swearing*,<sup>72</sup> to be of more general application and perhaps more closely related to obscenity. However, the act states as its justification that:

the horrible practice of profane Cursing and Swearing is inconsistent with the dignity & rational cultivation of the human mind, with a due reverence of the Supreme Being and his Providence, & hath a natural tendency to weaken the solemnity and obligation of Oaths lawfully taken in the administration of Justice; to promote falsehood, perjuries, blasphemies, and the dissoluteness of manners, and to loosen the bonds of civil society . . . .<sup>73</sup>

The focus of the statute seems far removed from the obscene, and aimed not at swearing and cursing in the modern sense, but rather at invoking the name of God in a curse or in an unlawfully taken oath.

Two New Hampshire statutes, adopted within a week of each other in 1791, also are cited. The first is titled *An Act for the Punishment of*

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<sup>67</sup> 1646 Mass. Bay General Laws & Liberties, ch. XVIII, § 3, 1814 Mass. Bay Colony Charters & Laws 58.

<sup>68</sup> *Id.* §§ 1, 2.

<sup>69</sup> *Id.* § 3.

<sup>70</sup> Act of 1782, ch. 8, 1836 Mass. Rev. Stat. 741, § 15.

<sup>71</sup> *Id.*

<sup>72</sup> Act of 1798, ch. 33, §§ 1, 3, 1836 Mass. Rev. Stat. 741, § 16.

<sup>73</sup> *Id.*

*Certain Crimes Not Capital.*<sup>74</sup> The Act contains a prohibition against libel and an additional prohibition against denying the existence of God, blaspheming the name of God, Jesus Christ, or the Holy Ghost.<sup>75</sup> It further bars cursing or reproaching the word of God as contained in the Old and New Testaments, once again reciting the names of the books of the Bible.<sup>76</sup>

The second statute, like the third of the Massachusetts statutes, bans profane swearing and cursing.<sup>77</sup> Unlike the Massachusetts statute, however, the explicit focus on using the name of God or unlawfully swearing is not present. The statute simply imposes a fine, imprisonment for one hour, or ten lashes on any person who "shall profanely curse or Swear."<sup>78</sup> The capitalization of "Swear" may indicate a formal oath, but there is no such hint of a limitation on the meaning of "curse" to religion, unless "profane" is taken to provide such a focus.<sup>79</sup> Nor, however, is there any indication that the statute is aimed at obscenity, and the statute provides no support for such a ban, other than as supporting the proposition that not all speech is absolutely protected. Certainly, there is no support for the *Roth* limitation of obscenity law to sexual and excretory activities. The general proposition that not all speech is absolutely protected, which the statute supports, provides equal support for a ban on depictions of violence.

The aim of the first of the two sections cited from New Jersey's law<sup>80</sup> is unclear. Section eight of the *Act for Suppressing Vice and Immorality* provides a half-dollar fine for profane swearing or cursing. Although supporting the proposition that not all speech was protected at the time of the Bill of Rights,<sup>81</sup> the section certainly does not focus on sexually explicit speech. Further, it provides no support for a distinction between depictions of sex and depictions of violence. The animus behind section nine is more clear. It is designed to protect the dignity of the judicial process by punishing profane swearing or cursing in the presence of a justice of the peace, while in the execution of the office of the justice of the peace.<sup>82</sup>

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<sup>74</sup> 1792 N.H. Laws 252, 256.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 258.

<sup>78</sup> *Id.*

<sup>79</sup> Professor Tribe derives "profane" from "in front of a temple." See *infra* note 211 and accompanying text.

<sup>80</sup> 1798 Act for Suppressing Vice and Immorality, §§ VIII, IX, 1800 N.J. Rev. Laws 329, 331.

<sup>81</sup> *Id.* § 8.

<sup>82</sup> *Id.* § 9.

Like the first section cited from New Jersey, the New York statute simply imposed a fine, this time of three shillings, on anyone profanely swearing or cursing.<sup>83</sup> *Roth* also cites a New York case in footnote twelve. Since the case is post-Bill of Rights, its relevance in the portion of *Roth* in which it appears can only be as an explanation of the pre-Bill of Rights statute cited. *People v. Ruggles*<sup>84</sup> upheld the criminal conviction of an individual who loudly proclaimed to a large crowd that "Jesus Christ was a bastard, and his mother must be a whore."<sup>85</sup> The charge was blasphemy, and the court determined that the First Amendment, while protecting discussion of religious views, did not protect blasphemy.<sup>86</sup> Once again, there is no support provided for obscenity laws, other than the general claim that not all speech is protected, and no basis for a distinction between sexual obscenity and violent obscenity is provided.

The North Carolina statute is less clearly focused on the protection of religion. The cited section, section III of *An Act for the Better Observation and Keeping of the Lord's Day, Commonly Called Sunday, and for the More Effectual Suppression of Vice and Immorality*,<sup>87</sup> prohibits profane swearing or cursing, with increased penalties for public officers so doing. In addition to a possible religious connotation to "profane," the previous section of the statute, as indicated in the title, prohibits work on the "Lord's day" so that people can "carefully apply themselves to the Duties of Religion and Piety."<sup>88</sup> Other sections are directed to swearing and cursing in court and to being drunk on Sunday.<sup>89</sup> The focus appears to be upon the protection of religious practice and the maintenance of religious, judicial, and perhaps public, dignity. The statute again provides no basis for *Roth's* insistence that obscenity is limited to sexual depictions.

Both of the Pennsylvania statutes cited also are aimed at the protection of religion. The first, *An Act to Prevent the Grievous Sins of Cursing and Swearing*,<sup>90</sup> punishes by fine or imprisonment any person who "shall willfully, premeditatedly . . . blaspheme or speak loosely and Profanely of Almighty God, or Christ Jesus, or the Holy Spirit, or the Scriptures of Truth . . . ."<sup>91</sup> The second, *An Act for the Prevention of Vice and*

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<sup>83</sup> 1788 Act for Suppressing Immorality, § IV, 2 N.Y. Laws 257, 258 (Jones & Varick 1777-1789).

<sup>84</sup> 8 Johns. 290 (N.Y. 1811).

<sup>85</sup> *Id.* at 292.

<sup>86</sup> *Id.*

<sup>87</sup> 1 N.C. Laws 52 (Martin Rev. 1715-1790).

<sup>88</sup> *Id.* § II.

<sup>89</sup> *Id.* §§ IV, V.

<sup>90</sup> II Pa. Statutes at Large 49 (1700-1712).

<sup>91</sup> *Id.*

*Immorality*,<sup>92</sup> at section II similarly punishes “any person of the age of sixteen years upwards [who] shall profanely curse or swear by the name of God, Christ Jesus, or the Holy Ghost . . . .”<sup>93</sup>

The Rhode Island statutes cited contain a section imposing a penalty of up to one hundred dollars fine and two months imprisonment for blasphemy, and a section prohibiting profane cursing and swearing upon pain of a fifty cent to one dollar fine for a first offense.<sup>94</sup> Again the aim of the profane cursing and swearing section is unclear. It does support the proposition that not all speech was protected, but it may focus on religion and certainly does not support a conclusion that sexual speech was not protected, while violence was.

The title alone of the South Carolina statute cited by the Court, *An Act for the More Effectual Suppressing of Blasphemy and Prophaneness*,<sup>95</sup> is enough to indicate its purpose. The Act recites its concern with those who “openly avowed and published many blasphemous and impious Opinions, contrary to the Doctrines and Principles of the Christian Religion, greatly tending to the Dishonour of Almighty God . . . .”<sup>96</sup> It makes illegal to “deny any one of the persons of the Holy Trinity to be God, or . . . assert or maintain there are more Gods than one, or . . . deny the christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine Authority . . . .”<sup>97</sup> Interestingly, the statute applied only to those educated in the Christian religion or having professed the Christian religion within South Carolina.

The Court cited two Vermont statutes. The first, *Act, for the Punishment of Certain Capital, and Other High Crimes and Misdemeanors*,<sup>98</sup> at section twenty made it illegal to “publicly deny the being and existence of God, or of the Supreme Being [or] contumeliously reproach his providence, and government.”<sup>99</sup> The statute clearly was aimed at the protection of religion. The second, *Act, for the Punishment of Certain Inferior Crimes and Misdemeanors*,<sup>100</sup> forbade profane swearing or cursing. Again, a link to religion might be drawn from the use of “profane,” but the context of the statute in a collection of sections regarding public disturbances and obstructing public proclamations makes it appear aimed

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<sup>92</sup> 3 Pa. Laws 177, 178 (1791-1802).

<sup>93</sup> *Id.*

<sup>94</sup> 1798 Act to Reform the Penal Laws, §§ 33, 34, 1798 R.I. Pub. Laws 584, 595.

<sup>95</sup> 1790 S.C. Laws 4.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> 1 Vt. Laws 332, 339 (Tolman 1808).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 352, 361.



at keeping the public peace. In either case, it provides no support for a distinction between sexual and violent obscenity.

Lastly, the Virginia statute<sup>101</sup> cited prohibited profane swearing or cursing on pain of an eighty-three cent fine for each offense or ten lashes, if unable to pay.<sup>102</sup> The statute appears aimed at the general maintenance of public dignity, as shown by the fact that it also prohibited drunkenness, imposing the same penalty.<sup>103</sup>

The only statute actually quoted by the Court was one of the Massachusetts statutes.<sup>104</sup> Interestingly, even that statute does not support, as a general proposition, the claim that obscenity and profanity legally were related. The only relationship present in the statute is that neither obscenity nor profanity could be used in any "'song, pamphlet, libel or mock sermon' in imitation or mimicking of religious services."<sup>105</sup> The context is interesting given the history of censorship as more concerned with the protection of religion than with the suppression of sexual materials.<sup>106</sup> A statute criminalizing the use of either in mimicry of religion does not equate the two and does not help in defining the concept of obscenity.

The second step in *Roth's* journey through history is the claim that "[a]t the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."<sup>107</sup> All of the statutes and cases cited, however, are later than the adoption of the Bill of Rights,<sup>108</sup> and even the characterization of some of the statutes and cases as concerning obscenity, at least in the modern Court's definition of the concept,<sup>109</sup> is suspect.<sup>110</sup>

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<sup>101</sup> 1792 Act for the Effectual Suppression of Vice, § 1, 1794 Va. Acts 286.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See *supra* note 57 and accompanying text.

<sup>105</sup> *Roth*, 354 U.S. at 483 (citing 1712 Mass. Bay Acts and Laws, ch. CV, § 8, 1814 Mass. Bay Colony Charters & Laws 39).

<sup>106</sup> See *infra* notes 246-47 and accompanying text.

<sup>107</sup> *Roth*, 354 U.S. at 483 (citing 1821 Act Concerning Crimes and Punishments, § 69, 1824 Conn. Stat. Laws 109; *Knowles v. State*, 3 Day (Conn.) 103 (1808); 1835 Rev. Stat., ch. 130, § 10, 1836 Mass. Rev. Stat. 740; *Commonwealth v. Holmes*, 17 Mass. 335 (1821); 1842 Rev. Stat., ch. 113, § 2, 1843 N.H. Rev. Stat. 221; 1798 Act for Suppressing Vice and Immorality, § XII, 1800 N.J. Rev. Laws 329, 331; *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815)).

<sup>108</sup> *Id.*

<sup>109</sup> See *supra* notes 42-54 and accompanying text.

<sup>110</sup> See *infra* notes 111-202 and accompanying text.

The earliest statute cited is New Jersey's *Act for Suppressing Vice and Immorality*;<sup>111</sup> however, that statute is not aimed at erotic material. Much more broadly, it bans from the "public stage . . . or other place whatever, any interludes, farces or plays of any kind, or any games, tricks, juggling, slight of hand, or feats of uncommon dexterity and agility of body, or any bear baiting or bull baiting, or any such like shews or exhibitions whatsoever . . . ."<sup>112</sup> The statute never uses the word "obscenity," nor does it make any reference to material of a sexual nature. The closest it comes to such a reference is in stating the legislature's concerns about the corruption of the morals of youth, along with concerns over bringing together idle persons, impoverishing families, gratifying "useless curiosity," and generally serving "no good or useful purpose in society."<sup>113</sup> The concern about the corruption of youthful morals as one of so many concerns, and the attempt to ban most exhibitions rather than a focus on the erotic, provides little support for the claim that there were contemporaneous obscenity statutes.<sup>114</sup> It provides no justification for the Court's insistence that obscenity be limited to the depictions of sexual or excretory acts.

The next earliest statute cited is Connecticut's *Act Concerning Crimes and Punishments*.<sup>115</sup> The statute is an obscenity statute in that it makes it illegal to "print, import, publish, sell, or distribute, any book, pamphlet, ballad, or other printed paper, containing obscene language, prints or descriptions . . . ."<sup>116</sup> The statute itself, however, provides no support for the Court's later limitation of obscenity to the erotic or even for the conclusion that obscenity includes the erotic. Furthermore, the 1821 date of the statute makes it something less than contemporaneous to the Bill of Rights.

The third statute, from Massachusetts, dates from 1835. The chapter, titled *Of Offences Against Chastity, Morality, and Decency*,<sup>117</sup> contained a section prohibiting the sale, distribution or publication of "any book, or any pamphlet, ballad, printed paper, or other thing, containing obscene language, or obscene prints, pictures, figures, or descriptions, manifestly

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<sup>111</sup> 1800 N.J. Rev. Laws 329, 331.

<sup>112</sup> *Id.* § XII. The statute did allow the exhibition of natural curiosities and of plays found by three justices of the peace to be innocent and of useful end. *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> If "obscene" means off-stage or not allowed to be shown on the stage, *see infra* notes 341-45, 359-80 and accompanying text, then the statute would be an obscenity statute in that it bans certain material from the stage. Once again, however, there is no basis in the statute for the conclusion that the statute was aimed at erotic material.

<sup>115</sup> 1821 Act Concerning Crimes and Punishments, § 69, 1824 Conn. Stat. Laws 109.

<sup>116</sup> *Id.*

<sup>117</sup> 1835 Rev. Stat., ch. 130, § 10, 1836 Mass. Rev. Stat. 740.

tending to the corruption of the morals of youth.”<sup>118</sup> Once again, it is not clear that the erotic is obscene, although the inclusion of “chastity” within the chapter title may be seen as providing weak support for that conclusion. While the corruption of youth might include material exposing youth to the erotic, that conclusion is not clear from the statute.<sup>119</sup> Furthermore, there is no reason to limit the materials that might corrupt the morals of youth to the erotic.

The latest of the “sufficiently contemporaneous” statutes cited was from the *Of Offences Against the Police of Towns* chapter of the New Hampshire statutes.<sup>120</sup> The statute dates from 1842, and its relevance to the Bill of Rights is questionable. It does, however, provide some insight into what was obscene in its time. The statute provides that

[n]o person shall sing or repeat, or cause to be sung or repeated any lewd, obscene or profane song, or shall repeat any lewd, obscene or profane words; or write or mark in any manner any obscene or profane word, or obscene or lascivious figure or representation on any building, fence, wall, post or any other thing whatever.<sup>121</sup>

The use of “lewd” and “lascivious” in the statute might be taken as a focus on the erotic. It also should be noted, however, that the statute may not provide much support for general bans on the obscene. The chapter containing the section concerned public nuisances, and the section itself addresses public recitation or posting, rather than banning the material itself.<sup>122</sup>

As with the statutes, the cases cited strengthen in support only as they become less contemporaneous. The earliest of the cases is *Knowles v. State*.<sup>123</sup> Knowles was convicted of violating Connecticut’s restrictions on plays and public performances by displaying a “horrid and unnatural monster.”<sup>124</sup> The description offered of the monster in question fails to match any contemporary views on obscenity:

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<sup>118</sup> *Id.*

<sup>119</sup> Other contemporaneous uses of the word “obscene” would provide insight into its meaning within the statute, but the definition of “obscene” in the era is not as clear as might be expected. See *infra* notes 246-88 and accompanying text.

<sup>120</sup> 1842 Rev. Stat., ch. 113, § 2, 1843 N.H. Rev. Stat. 221.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> 3 Day 103 (Conn. 1808).

<sup>124</sup> *Id.* at 103.

And the head of said *monster*, represented by said picture, resembles that of an *African*, but the features of the face are indistinct: there are apertures for eyes, but no eyes; his chin projects considerably, and the ears are placed unnaturally back, on or near the neck; its fore legs, by said picture, are here represented to lie on its breast, nearly in the manner of human arms; its skin is smooth, without hair, and of dark, tawny, or copper colour.<sup>125</sup>

Knowles' conviction was reversed, with the court holding that his exhibition was not within the scope of the statute.<sup>126</sup> The court did, however, accept the proposition that "[e]very public show and exhibition, which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law."<sup>127</sup> Even under the common law, the conviction could not stand for failure of the information to "particularly state the circumstances in which the indecency, barbarity or immorality, consists."<sup>128</sup>

This case lends little support for the Court's position in *Roth*. It does support the proposition that, at common law, though somewhat after the Bill of Rights, some material could be kept from the stage. Its broad language of "outrag[ing] decency," "shock[ing] humanity," being "contrary to good morals," and "barbarity" provides little specificity as to what could be the subject of such a ban. Particularly, the reference to "barbarity" would belie a sole focus on sexual or excretory activities.

The second of the cases cited in *Roth* is to the Pennsylvania Supreme Court's 1815 decision in *Commonwealth v. Sharpless*.<sup>129</sup> Sharpless was charged with exhibiting:

a certain lewd, wicked, scandalous, infamous and obscene painting, representing a man in an obscene, impudent, and indecent posture with a woman, to the manifest corruption and subversion of youth, and other citizens of this commonwealth, to the evil example of all others in like case offending, and against the peace and dignity of the Commonwealth of Pennsylvania.<sup>130</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 107.

<sup>127</sup> *Id.* at 108.

<sup>128</sup> *Id.*

<sup>129</sup> 2 Serg. & Rawle 91 (Pa. 1815).

<sup>130</sup> *Id.* at 91-92.

The exhibition was not as public as that in *Knowles*, having occurred inside a house, but it was public in the sense that the painting was shown to a paying public audience.<sup>131</sup> It also appears from the charge that the objection to the material focused on its sexual nature.<sup>132</sup>

Chief Justice Tilghman could find no statute contrary to the defendant's acts, but he opined that acts of public indecency were indictable as corrupting public morality.<sup>133</sup> That which corrupts society was said to be indictable as a breach of the peace.<sup>134</sup> Justice Yeates also stressed that that which leads to the destruction of morality in general is punishable under the common law. "The corruption of the public mind, in general, and debauching the manners of youth, in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences, and in such instances, courts of justice are, or ought to be, the schools of morals."<sup>135</sup>

*Sharpless* does provide support for the proposition that obscenity was punishable in 1815, at least in Pennsylvania. The 1815 date is, of course, after the adoption of the Bill of Rights. Although the time span may not be terribly great, that the Court had to go so far into the future to find isolated cases supporting the proposition that obscenity was punishable calls into question the relevance of those cases to the law at the time of the adoption of the First Amendment.

Furthermore, it is unclear that *Sharpless* should be taken as supporting the position that obscenity is limited to sexual or excretory activities. While the painting exhibited by *Sharpless* may have been sexual in its content, the language of the opinion is broader. That which "corrupt[s] public morality" or "corrupts society" or leads to "[t]he corruption of the public mind" was said to be punishable.<sup>136</sup> Although the sexual material at issue was held to fall within that category, the opinion does not state that exhibitions depicting other subjects cannot also come within the category, and the broad language used may be taken to allow a wider scope to obscenity law.

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<sup>131</sup> *Id.* at 91.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 101. Chief Justice Tilghman relied on the English conviction of Sir Charles Sedley for standing naked on a balcony in London. Although the Chief Justice recognized that Sir Charles also had thrown down bottles of urine on the crowd below, he concluded that the conviction rested primarily on his "exposure of his person." *Id.* This reading of the case may be questioned, *see infra* notes 249-55 and accompanying text, and in any case, simple nudity would not fit current definitions of obscenity.

<sup>134</sup> *Sharpless*, 2 Serg. & Rawle at 102.

<sup>135</sup> *Id.* at 103 (Yeates, J., concurring).

<sup>136</sup> *Id.* (Yeates, J., concurring).

Much of what was said of *Sharpless* also may be said of the last of the cases cited, the 1821 Massachusetts case *Commonwealth v. Holmes*.<sup>137</sup> The *Holmes* case was based on the publication of a "lewd and obscene print" contained in the book *Memoirs of a Woman of Pleasure*.<sup>138</sup> The objections to the book and print appear to arise out of their sexual nature, although the issues on appeal were the jurisdiction of the lower court and the sufficiency of the indictment.<sup>139</sup> The court's opinion rejecting the claims on appeal might be read to assume that sufficiently offending sexual material may be banned as obscene, again well after the Bill of Rights. Nothing in the opinion, however, supports a claim that the category of the obscene is so limited to such material.

The *Roth* opinion also cited several Supreme Court opinions that demonstrate that the "Court has always assumed that obscenity is not protected by the freedoms of speech and press."<sup>140</sup> The cases date from 1877 to 1953, falling somewhat short of having "always assumed that obscenity is not protected," particularly from the point of view of constitutionally relevant eras. Furthermore, most of the references to obscenity are dicta and none make any effort to define obscenity, particularly with any limitation to sexual or excretory activities to the exclusion of depictions of violence.

Several of the cases concerned regulation of the mails and interstate commerce. *Ex Parte Jackson*<sup>141</sup> held constitutional a federal statute prohibiting using the mails for lottery advertisements, while noting that the act also prohibits mailing obscene materials.<sup>142</sup> *United States v. Chase*<sup>143</sup> again held constitutional the same statute, but excluded private letters in plain envelopes from the definition of obscene writing.<sup>144</sup> *Public Clearing House v. Coyne*<sup>145</sup> also had to do with bans on mailing obscene materials and held that the Postmaster's refusal to deliver such materials did not violate due

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<sup>137</sup> 17 Mass. 335 (1821).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 336.

<sup>140</sup> *Roth*, 354 U.S. at 481 (citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1953); *Winters v. New York*, 333 U.S. 507, 510 (1948); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942); *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *Hoke v. United States* 227 U.S. 308, 322 (1913); *Public Clearing House v. Coyne*, 194 U.S. 497, 508 (1904); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897); *United States v. Chase*, 135 U.S. 255, 261 (1890); *Ex Parte Jackson*, 96 U.S. 727, 736-37 (1877)).

<sup>141</sup> 96 U.S. 727, 736-37 (1877).

<sup>142</sup> *Id.* at 737.

<sup>143</sup> 135 U.S. 255, 261 (1890).

<sup>144</sup> *Id.* at 262.

<sup>145</sup> 194 U.S. 497, 508 (1904).

process.<sup>146</sup> *Hoke v. United States*<sup>147</sup> included regulation of obscene materials along with regulation of prostitution as within Congress' power to regulate interstate commerce.<sup>148</sup> Lastly, *Hannegan v. Esquire, Inc.*<sup>149</sup> again accepted limitations on mailing obscene materials.<sup>150</sup>

Other cases mentioned limitations on obscene materials in arguing for or against other limitations on constitutional rights. *Robertson v. Baldwin*<sup>151</sup> merely mentioned limits on obscene material as an exception to the Bill of Rights in ruling on the constitutionality of involuntarily returning deserting merchant marines to their ships. *Near v. Minnesota*,<sup>152</sup> in disapproving prior restraints on the press, noted that there may be prohibitions on publishing obscene materials. *Chaplinsky v. New Hampshire*,<sup>153</sup> in holding that fighting words were without first amendment protection, included obscenity and profanity as also unprotected. *Beauharnais v. Illinois*,<sup>154</sup> in its discussion of group libel, said that no one contends that obscene speech only can be punished if it presents a clear and present danger.

Most interesting among the cases cited is *Winters v. New York*.<sup>155</sup> The cite was to a portion of the opinion noting that, while value in speech may not be required for protection, if material is obscene or profane, it may be controlled. What makes the cite interesting, however, is that the statute, under which the material at issue was argued to be obscene, focused not on sexual or excretory activities, but on crime and violence.<sup>156</sup>

The *Roth* Court also cited cases reviewing convictions under federal obscenity law.<sup>157</sup> Those cases, dating from 1895 to 1932, all held constitutional prohibitions on the use of the mails for shipping obscene materials. One of the cases cited, *Swearingen v. United States*,<sup>158</sup> is of particular importance. It is this 1896 case that has been cited as the first

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<sup>146</sup> *Id.* at 516.

<sup>147</sup> 227 U.S. 308, 322 (1913).

<sup>148</sup> *Id.* at 323.

<sup>149</sup> 327 U.S. 146, 158 (1946).

<sup>150</sup> *Id.*

<sup>151</sup> 165 U.S. 275, 281 (1897).

<sup>152</sup> 283 U.S. 697, 716 (1931).

<sup>153</sup> 315 U.S. 568, 571-72 (1942).

<sup>154</sup> 343 U.S. 250, 266 (1953).

<sup>155</sup> 333 U.S. 507, 510 (1948).

<sup>156</sup> See *infra* notes 205-21 and accompanying text.

<sup>157</sup> See *Roth*, 354 U.S. at 481 n.9 (citing *United States v. Limehouse*, 285 U.S. 424 (1932); *Bartell v. United States*, 227 U.S. 427 (1913); *Price v. United States*, 165 U.S. 311 (1897); *Dunlop v. United States*, 165 U.S. 486 (1897); *Rosen v. United States*, 161 U.S. 29 (1896); *Swearingen v. United States*, 161 U.S. 446 (1896); *Andrews v. United States*, 162 U.S. 420 (1896); *Grimm v. United States*, 156 U.S. 604 (1895)).

<sup>158</sup> 161 U.S. 446 (1896).

American case in which it became clear that obscenity had developed an exclusive focus on sexual activities.<sup>159</sup>

The *Roth* opinion also notes, in support of its conclusion that obscene material merits no first amendment protection, twenty federal obscenity laws enacted between 1842 and 1956.<sup>160</sup> As with the state statutes and the case law cited, the older the federal statute the less clear the focus. The 1842 enactment barred the importation of "indecent and obscene" prints, paintings, lithographs, engravings, and transparencies.<sup>161</sup> The 1857 statute amended the 1842 statute to include articles, images, figures, daguerreotypes, and photographs.<sup>162</sup> Neither statute defined "obscene" or "indecent." Nor did either establish a basis for distinguishing sexual obscenity from violent obscenity.

The next federal statute was enacted in 1865. It barred from the mails "obscene" books, pamphlets, pictures, and prints, along with other "vulgar and indecent" publications.<sup>163</sup> The 1872 statute added printed or engraved "disloyal devices" and envelopes or postal cards with "scurrilous epithets" to the items not to be mailed.<sup>164</sup> Again, no definitions are provided, and the language—"vulgar" and "scurrilous"—may go beyond depictions of sexual activity.

The first federal general criminal statute that went beyond the mails or importation was enacted in 1873.<sup>165</sup> The statute applied in the District of Columbia, territories, and other areas within the exclusive jurisdiction of the United States.<sup>166</sup> It banned distribution, exhibition, or advertisement of any "obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure, or image . . . or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion . . . ."<sup>167</sup> The statute also amended the 1872 statute to bar from

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<sup>159</sup> See *infra* note 288 and accompanying text.

<sup>160</sup> *Roth*, 354 U.S. at 485 (citing 70 Stat. 699 (1956); 69 Stat. 183 (1955); 64 Stat. 451 (1950); 64 Stat. 194 (1950); 62 Stat. 768 (1948) (codified as amended at 18 U.S.C. §§ 1460-1469 (1988 & Supp. 1992)); 48 Stat. 1091, 1100 (1934); 46 Stat. 688 (1930); 41 Stat. 1060 (1920); 35 Stat. 1129, 1138 (1909); 33 Stat. 705 (1905); 29 Stat. 512 (1897); 26 Stat. 567, 614-15 (1890); 25 Stat. 496 (1888); 25 Stat. 187, 188 (1888); 19 Stat. 90 (1876); 17 Stat. 598 (1873); 17 Stat. 302 (1872); 13 Stat. 504, 507 (1865); 11 Stat. 168 (1857); 5 Stat. 548, 566 (1842)).

<sup>161</sup> 5 Stat. 548, 566 (1842).

<sup>162</sup> 11 Stat. 168 (1857).

<sup>163</sup> 13 Stat. 504, 507 (1865).

<sup>164</sup> 17 Stat. 302 (1872).

<sup>165</sup> 17 Stat. 598 (1873).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*



the mails the objects banned in federal territories.<sup>168</sup> Again, no definition is provided; however, that portion of the statute amending the 1872 statute adds “lewd, or lascivious” to “obscene” as adjectives describing the items banned.<sup>169</sup> That language may indicate the beginning of a focus on sex. Further, the concern over contraception may provide some additional, though weak, evidence for such a focus.

The 1876 statute simply amended the 1872 statute to increase the penalties,<sup>170</sup> but the first 1888 statute cited in *Roth* increased the scope of mail bans. It barred misrepresenting the contents of mail and further declared unmailable anything in an envelope or wrapper “upon which indecent, lewd, lascivious, obscene, libelous, scurrilous, or threatening delineations, epithets, terms, or language, or reflecting injuriously upon the character or conduct of another, may be written or printed . . . .”<sup>171</sup> The second 1888 statute amended the first 1888 statute and the 1872 statute in minor ways.<sup>172</sup>

The 1890 statute cited in *Roth* again addressed importation, barring the same sorts of objects whose distribution was declared illegal in the 1873 statute.<sup>173</sup> The statute also addressed federal government employees aiding or abetting in violations of federal law prohibiting distribution, advertisement, exhibition, or mailing the same sorts of objects.<sup>174</sup> The 1897 statute extended the mail bans to private express companies and common carriers,<sup>175</sup> and the 1905 statute amended the 1897 statute to include a ban on exportation of such materials from the United States, its territories, and the District of Columbia.<sup>176</sup>

The first 1909 statute adds “filthy” and “vile” to “obscene, lewd, or lascivious” in describing the materials banned from the mails—materials similar to those banned in the 1888 and 1890 statutes.<sup>177</sup> The addition of the new adjectives might signal a heightened focus on sexual materials, but need not have that connotation.<sup>178</sup> The second 1909 statute was a minor amendment to the exportation statute,<sup>179</sup> and the 1920 statute reflected

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> 19 Stat. 90 (1876).

<sup>171</sup> 25 Stat. 187, 188 (1888).

<sup>172</sup> 25 Stat. 496 (1888).

<sup>173</sup> 26 Stat. 567, 614-15 (1890); *see supra* notes 165-69 and accompanying text.

<sup>174</sup> *Id.*

<sup>175</sup> 29 Stat. 512 (1897).

<sup>176</sup> 33 Stat. 705 (1905).

<sup>177</sup> 35 Stat. 1129 (1909).

<sup>178</sup> *See infra* notes 340-45 and accompanying text.

<sup>179</sup> 35 Stat. 1129, 1138 (1909).

technological change in adding "filthy" motion pictures to the banned "filthy" books, pamphlets, and pictures of several earlier statutes.<sup>180</sup>

The Tariff Act of 1930<sup>181</sup> added seditious materials and lottery tickets to items that could not be imported, while maintaining the ban on "obscene or immoral" materials.<sup>182</sup> Although still providing no definition of "obscene," the statute does begin to reflect the view that even obscene materials may have worth. It provided that "the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes."<sup>183</sup>

The next two cited statutes, parts of the Communications Act of 1934,<sup>184</sup> also reflect technological innovation, banning "obscene, indecent, or profane language" from the airways<sup>185</sup> and setting penalties for such broadcast.<sup>186</sup>

The 1948 statute is particularly interesting. The statute codified a portion of the 1909 statute discussed above,<sup>187</sup> under the title *Mailing obscene or crime-inciting matter*, and added that the term "indecent" includes matter that would tend to incite arson, murder, or assassination.<sup>188</sup> Although the section title did distinguish between "obscene" and "crime-inciting," perhaps showing that by the 1940s the two categories were distinct, the inclusion of crime-inciting material as indecent calls into question any sole focus on sex in the earlier statutes.

The three remaining statutes have little to add. The first 1950 statute cited added phonograph records, electrical transcriptions, and other sound recordings to the categories of objects that may be obscene within the 1948 statute.<sup>189</sup> The second 1950 statute increased the powers of the Postmaster General with regard to mailings of "obscene, lewd, lascivious, indecent, filthy, or vile" materials.<sup>190</sup> Lastly, the 1955 statute amended the 1948 statute in ways that cast no new light on the definition of

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<sup>180</sup> 41 Stat. 1060 (1920).

<sup>181</sup> 46 Stat. 688 (1930).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> 48 Stat. 1091 (1934).

<sup>185</sup> *Id.*

<sup>186</sup> 48 Stat. 1100 (1934).

<sup>187</sup> See *supra* note 177 and accompanying text.

<sup>188</sup> 62 Stat. 768 (1948) (codified as amended at 18 U.S.C. §§ 1460-1469 (1988 & Supp. 1992)).

<sup>189</sup> 64 Stat. 194 (1950).

<sup>190</sup> 64 Stat. 451 (1950).

“obscene.”<sup>191</sup> The definition of “indecent” as including material tending to incite arson, murder, or assassination remained, and in fact still remains.<sup>192</sup>

The Court’s reliance in *Roth* on federal statutes does little to provide a definition for obscenity. At best, weak support for a sole focus on sexual depictions is found in the use of terms such as “lewd,” “lascivious,” “filthy,” and “indecent” in some of the statutes. At least one line of statutes, however, included crime-inciting material within the indecent.<sup>193</sup> Lacking any statutory definitions of “obscene,” the statutes must be interpreted in the context of obscenity cases and the common meaning of the word. The case law shows a development in which “obscene” does take on the focus that the Court finds, but at a date later than any that would be of constitutional significance.<sup>194</sup> Common usage provides no better basis for the Court’s conclusion. Indeed, it is not clear even at present that the use of “obscene” should be so limited.<sup>195</sup>

The last source to which the Court turned in support for its denial of protection to obscene materials was international sentiment. The Court said that its rejection of protection for obscene materials “is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations . . . .”<sup>196</sup> The authority that the opinion cites appears to be a 1956 treaty, which would be weak support for the constitutionality of obscenity bans. A 1956 treaty would show only the international climate at the time of *Roth* rather than at any more constitutionally relevant time. The treaty, however, has a longer pedigree, dating from the Agreement for the Repression of the Circulation of Obscene Publications, in force since 1911.<sup>197</sup> Even that earlier date is, of course, after any dates of constitutional importance, and the treaty shows only the modern era’s willingness to ban obscene publications.

Although the international willingness to ban depictions of violence has not taken treaty form, some foreign countries have suppressed such

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<sup>191</sup> 69 Stat. 183 (1955).

<sup>192</sup> 18 U.S.C. § 1461 (1988).

<sup>193</sup> See *infra* notes 216-21 and accompanying text.

<sup>194</sup> See *infra* note 291 and accompanying text.

<sup>195</sup> See *infra* note 380 and accompanying text.

<sup>196</sup> *Roth*, 354 U.S. at 485 (citing Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511 (1911); Treaties in Force 209 (Oct. 31, 1956)).

<sup>197</sup> Agreement for the Repression of the Circulation of Obscene Publications, May 4, 1910, 37 Stat. 1511 (1911). Although the treaty speaks of obscene materials, without defining such materials either explicitly or implicitly, the focus of obscenity on the sexually explicit occurred prior to the date of the treaty, see *infra* note 288 and accompanying text, and it would seem reasonable to limit the scope of the treaty to such materials.

materials. For example, the 1950s importation into Great Britain of American horror comics led to a ban on books and magazines mainly containing stories told in pictures and depicting crime, violence, cruelty, or repulsive or horrible incidents, if they were likely to fall into the hands of youths and would tend to corrupt such young persons.<sup>198</sup> Interestingly, the definition of young persons, for the purposes of the statute, ran to a slightly older age than would allow admission to a sexually explicit film.<sup>199</sup>

In the same era, New Zealand showed concerns over the corruption of its youth by American horror comics. New Zealand established registration and licensing requirements for publishers and required compliance with indecency laws as a condition for a license.<sup>200</sup> Indecency, for purposes of the statute, encompassed not only sexually explicit material but also material that "unduely emphasizes . . . horror, crime, cruelty or violence."<sup>201</sup> While the licensing system was later repealed, the impetus for that repeal seemed to have been concern over chilling effects rather than a reconsideration of the propriety of banning horror or crime comics.<sup>202</sup>

Legal bans on works depicting violence may not be very widespread. The relevance of the treaty on sexual obscenity, however, remains unclear. It certainly would appear irrelevant to the Constitution. While the meaning of "obscene" in eras of constitutional relevance is important, any developing consensus in the 1900s is irrelevant. Beyond its irrelevance, the claim may even be questionable. The United States has struggled with what should be considered obscene. Even the general Anglo-American focus of obscenity on sex did not become clear until the late 1800s.<sup>203</sup> The surety with which the conclusion can be drawn that such a focus also existed in other signatory nations at the time of the treaty is diminished by translation difficulties associated with such a complex concept and the development of a focus in those countries.

#### B. *The Supreme Court's Treatment of Media Depictions of Violence*

If post-Bill of Rights, and indeed post-Fourteenth Amendment, statutes banning sexual obscenity are to provide justification for the constitutional-

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<sup>198</sup> DAVID H. TRIBE, QUESTIONS OF CENSORSHIP 82-83 (1973).

<sup>199</sup> *Id.* at 83.

<sup>200</sup> Indecent Publications Amendment Act, 2 N.Z. Stat. 1171 (1954).

<sup>201</sup> *Id.*

<sup>202</sup> For a discussion of New Zealand's treatment of the subject, see Charlotte L. Bynum, *Feminism and Pornography: A New Zealand Perspective*, 65 TUL. L. REV. 1131 (1991).

<sup>203</sup> See *infra* note 288 and accompanying text.

ity of such a ban,<sup>204</sup> there are two Supreme Court cases involving violence that deserve consideration. The two cases, and the insight they contain into the statutory climate of the era, provide equal justification for a ban on excessively violent material.

The first case is *Winters v. New York*.<sup>205</sup> *Winters* is the appeal of a conviction for possession with intent to sell the magazine *Headquarters Detective, True Cases from the Police Blotter*.<sup>206</sup> The conviction was obtained under a statutory section making it illegal "to sell . . . any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime . . . ."<sup>207</sup> Interestingly, despite the focus of the statute on violence and crime, although also including lust, the section was titled "Obscene prints and articles."<sup>208</sup>

The statute in question originally had been enacted to protect minors from exposure to such violent material but later had been amended to include other audiences.<sup>209</sup> The New York Court of Appeals also had narrowed the statute through construction: The New York court noted that "collections of criminal deeds of bloodshed or lust 'can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense . . . .'"<sup>210</sup> and limited application to such material. The state court was concerned that the statute not be read to "'outlaw all commentaries on crime from detective tales to scientific treatises' on the ground that the legislature did not intend such literalness of

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<sup>204</sup> See *supra* notes 55-203 and accompanying text; see *infra* notes 205-88 and accompanying text.

<sup>205</sup> 333 U.S. 507 (1948).

<sup>206</sup> *Id.* at 508 n.1.

<sup>207</sup> NEW YORK PENAL LAW § 1141 (Consol. 1938).

Obscene prints and articles

1. A person . . . who,

2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime;

. . .

Is guilty of a misdemeanor . . . .

<sup>208</sup> *Id.*

<sup>209</sup> *Winters*, 333 U.S. at 511 (citing 1884 N.Y. Laws 380; 1887 N.Y. Laws 692; 1941 N.Y. Laws 925).

<sup>210</sup> *Id.* at 513 (quoting *People v. Winters*, 63 N.E.2d 98, 100 (1945)).

construction.”<sup>211</sup> The court also left open the question of whether the statute applied to material that did not focus on bloodshed or lust, since the material at issue did have such a focus.<sup>212</sup>

Although the Court in *Winters* struck down the statute, it did so on vagueness grounds while seeming to tolerate the inclusion of such material within the category of indecent and obscene.<sup>213</sup> The Court noted that the statute went beyond punishing the distribution of material that was obscene or indecent “in the usual sense” and also reached magazines that were “indecent and obscene because they ‘massed’ stories of bloodshed and lust to incite crimes.”<sup>214</sup> The Court also noted that the material at issue was not “indecency or obscenity in any sense heretofore known to the law”<sup>215</sup> and that the material was not “indecent and obscene, as formerly understood.”<sup>216</sup> Yet, the Court did not strike the statute down because it categorized non-erotic material as obscene. Rather, the Court warned against the implication that the state could not punish the circulation of objectionable material, within first amendment limitations, under a sufficiently definite statute<sup>217</sup> and that “[n]either the states nor Congress are prevented by the requirement of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise.”<sup>218</sup>

Although believing that New York’s statute employed an expanded definition of “obscene,”<sup>219</sup> such an increased inclusion is not what caused the statute to be declared unconstitutional. If the Court believed that only erotic material could be banned as obscene, the conviction and statute easily would have fallen on that basis. Instead, it was a chilling-effect concern that led to the statute’s demise:

[W]e find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner. Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterized by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of

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<sup>211</sup> *Id.* (quoting *Winters*, 63 N.E.2d at 99).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 519-20.

<sup>214</sup> *Id.* at 513.

<sup>215</sup> *Id.* at 519.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 520.

<sup>218</sup> *Id.*

<sup>219</sup> *But see infra* notes 339-80 and accompanying text.

pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications.<sup>220</sup>

It did not seem to the Court "that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes.'"<sup>221</sup>

A second Supreme Court case of interest is *Kingsley Books v. Brown*,<sup>222</sup> handed down the same day as *Roth*. *Kingsley Books* held that injunctions may issue against the sale and distribution of obscene material.<sup>223</sup> The obscenity of the material against which the injunction was sought was not contested and the sole question was the propriety of issuing an injunction.<sup>224</sup> The failure to object to the finding of obscenity is telling in that the material at issue was primarily violent rather than sexual.

The publication giving rise to *Kingsley Books* was a series of "paper-covered *obscene* booklets"<sup>225</sup> published under the title *Nights of Horror*. Although the New York state court also had labeled the material "obscene," the description and objections presented by that court focused strongly on the material's violent aspects.<sup>226</sup> That is not to say that the lower court did not consider the material to be without sexual content. The court noted that, although sexual relationships can be beautiful and healthy, the publications in question did not reflect such beauty.<sup>227</sup> Citing Judge Learned Hand's view that "the word 'obscene' should 'be allowed to indicate the present critical point in the compromise between candor and shame,'"<sup>228</sup> the court had no trouble finding that

"Nights of Horror" will be found resting at the foot of the scale, clearly marked "shame". No matter how strict the test or how broad the criteria, these volumes will readily measure up to and even surpass the most generous standard.

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<sup>220</sup> *Winters*, 333 U.S. at 519.

<sup>221</sup> *Id.* at 520.

<sup>222</sup> 354 U.S. 436 (1957).

<sup>223</sup> *Id.* at 444-45.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 438 (emphasis added).

<sup>226</sup> *Burke v. Kingsley Books*, 142 N.Y.S.2d 735 (N.Y. Sup. Ct. 1955), *aff'd*, 134 N.E.2d 461 (N.Y. 1956), *aff'd*, 354 U.S. 436 (1957).

<sup>227</sup> *Id.* at 741.

<sup>228</sup> *Id.* (quoting *United States v. Kennerley*, 209 F. 119, 121 (S.D.N.Y. 1913)).

The booklets in evidence offer naught but glorified concepts of lustful and vicious concupiscence, and by their tenor deride love and virtue, invite crime and voluptuousness, and excite lecherous desires. . . . There is no true dissemination of lawful ideas—rather there is a direct incitement to sex crimes and the sordid excitement of brutality.<sup>229</sup>

The court also stated that the material would affect the libido of the normal, healthy person and that the effect on the abnormal person could be disastrous on the individual and others.<sup>230</sup>

The court also went to some length to state its view that the materials were not literature but pornography, lacking plot and style and failing to meet any literary standards.<sup>231</sup> The covers included sexually suggestive drawings, and the volume of misspelled words, poor grammar, and printing errors showed no “genuine literary intent.”<sup>232</sup> The only contribution to literature was, in the court’s view, as a glossary of terms of sexual anatomy and practices.<sup>233</sup>

Although the court did label the material pornographic, the major focus of its objection was on the publications’ depictions of violence:

“Nights of Horror” is no haphazard title. Perverted sexual acts and macabre tortures of the human body are repeatedly depicted. The books contain numbers of acts of male torturing female and some vice versa—by most ingenious means. These gruesome acts included such horrors as cauterizing a woman’s breast with a hot iron, placing hot coals against a woman’s breasts, tearing breasts off, placing hot irons against a female’s armpits, pulling off a girl’s fingernails with white-hot pincers, completely singeing away the body hairs, working a female’s skin away from her flesh with a knife, gouging and burning eyes out of their sockets, ringing the nipples of the breast with needles. Hanging by the thumbs, hair pulling, skin burning, putting on bone-compressing iron boots, were usual. The torture rack abounded. Self-torture was frequent. Sucking a victim’s blood was pictured; and so was pouring molten lead into a girl’s mouth and ears; and putting honey on a

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 742.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*



girl's breasts, vagina and buttocks—and then putting  
hundreds of great red ants on the honey.<sup>234</sup>

Certainly, portions of the violence depicted did involve sex-specific anatomical structures. The general tenor of the material, however, appears to be the description of the infliction of pain on every conceivable sensitive area of the body. Genitals and breasts provided such sensitive areas, but so did armpits, eyes, fingernails, thumbs, and skin and bones generally.<sup>235</sup>

Although the court noted the expression of a belief in male power over females and of older males over youth, and also the depiction of sodomy, rape, lesbianism, and seduction,<sup>236</sup> these subjects alone would not make the material obscene. A work is not obscene because it discusses an objectional subject or argues for an objectional thesis.<sup>237</sup> Obscenity is instead based on the material used to discuss that subject or argue for that thesis.<sup>238</sup> Such material must include objectional depictions of acts.<sup>239</sup> Although those acts have most commonly been sexual or excretory, the objections to *Nights of Horror* appear primarily to be over its depiction of violence. In fact, the complaint upon which the prosecution proceeded was filed in September of 1954,<sup>240</sup> just one month after

New Yorkers were stunned to learn of the wanton savagery of four Brooklyn teen-agers who horsewhipped, beat, kicked, and burned their several victims, allegedly drowning one of them—all for amusement. The eighteen-year-old leader . . . boasted of having read every volume in the *Nights of Horror* series. A psychiatrist who examined him found “the parallelism is complete” between *Nights of Horror* texts and pictures and the methods used by the youthful killers.<sup>241</sup>

The impetus for prosecution appears to have been over violence rather than eroticism.

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 742-43.

<sup>237</sup> See, e.g., *Kingsley Int'l Pictures v. Regents*, 360 U.S. 684 (1959) (portraying sexual immorality as acceptable or proper behavior not in itself obscene); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (holding that pornography statutes may not select among viewpoints), *aff'd*, 475 U.S. 1001 (1986).

<sup>238</sup> *Kingsley Int'l Pictures*, 360 U.S. at 688.

<sup>239</sup> *Id.*

<sup>240</sup> *Kingsley Books*, 354 U.S. at 438.

<sup>241</sup> RICHARD H. KUH, FOOLISH FIGLEAVES? PORNOGRAPHY IN-AND OUT OF-COURT 44 (1967) (footnote omitted).

Although both *Winters* and *Kingsley Books* were cases from New York, legislative concern over violence was more widespread than these two cases might indicate.<sup>242</sup> Justice Frankfurter dissented in *Winters* and was joined by Justices Jackson and Burton.<sup>243</sup> In that dissent, he noted that twenty states had the same legislation as that which was struck down as vague,<sup>244</sup> and that four other states had statutes that were similar but not identical.<sup>245</sup>

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<sup>242</sup> See *infra* notes 293-334 and accompanying text.

<sup>243</sup> *Winters*, 333 U.S. at 520 (Frankfurter, J., dissenting).

<sup>244</sup> Justice Frankfurter stated:

These are the statutes that fall by this decision:

1. Gen. Stat. Conn. (1930) c. 329, § 6245, derived from L. 1885, c. 47, § 2.
2. Ill. Ann. Stat. (Smith-Hurd) c. 38, § 106, derived from Act of June 3, 1889, p. 114, § 1 (minors).
3. Iowa Code (1946) § 725.8, derived from 21 Acts, Gen. Assembly, c. 177, § 4 (1886) (minors).
4. Gen. Stats. Kan. (1935), § 21-1102, derived from L. 1886, c. 101, § 1.
5. Ky. Rev. Stat. (1946) § 436.110, derived from L. 1891-93, c. 182, § 217 (1893) (similar).
6. Rev. Stat. Maine (1944) c. 121, § 27, derived from Acts and Resolves 1885, c. 348, § 1 (minors).
7. Ann. Code Md. (1939) Art. 27, § 496, derived from L. 1894, c. 271, § 2.
8. Ann. Laws Mass. (1933) c. 272, § 30, derived from Acts and Resolves 1885, c. 305 (minors).
9. Mich. Stat. Ann. (1938) § 28.576, derived from L. 1885, No. 138.
10. Minn. Stat. (1945) § 617.72, derived from L. 1885, c. 268, § 1 (minors).
11. Mo. Rev. Stat. (1939), § 4656, derived from Act of April 2, 1885, p. 146, § 1 (minors).
12. Rev. Code Mont. (1935), § 11134, derived from Act of March 4, 1891, p. 255, § 1 (minors).
13. Rev. Stat. Neb. (1943) § 28-924, derived from L. 1887, c. 113, § 4 (minors).
14. N.Y. Consol. L. (1938) Penal Law, Art. 106, § 1141(2), derived from L. 1884, c. 380.
15. N. D. Rev. Code (1943) § 12-2109, derived from L. 1895, c. 84, § 1 (similar).
16. Ohio Code Ann. (Throckmorton, 1940) § 13035, derived from 82 Sess. L. 184 (1885) (similar).
17. Ore. Comp. L. Ann. (1940) § 23-924, derived from Act of Feb. 25, 1885, p. 126 (similar).
18. Pa. Stat. Ann. (1945) Tit. 18, § 4524, derived from L. 1887, P.L. 38, § 2.
19. Rev. Stat. Wash. (Remington, 1932) § 2459(2), derived from L. 1909, c. 249, § 207(2).
20. Wis. Stat. (1945) § 351.38(4), derived from L. 1901, c. 256.

*Winters*, 333 U.S. at 522-23 (Frankfurter, J., dissenting) (footnotes omitted); see also *infra* notes 293-330 and accompanying text.

<sup>245</sup> Justice Frankfurter stated:

The following statutes are somewhat similar, but may not necessarily be rendered unconstitutional by the Court's decision in the instant case:

### III. A COMPARISON OF THE LEGAL HISTORIES OF SEX AND VIOLENCE AS OBSCENITY

There seems to be general accord that the origins of censorship and obscenity law were religious. Professor Schauer notes that in ancient drama and writing there was full toleration for sexually explicit material, but that blasphemy and heresy were strongly condemned.<sup>246</sup> Professor Tribe agrees that early censorship was aimed at religious ideas and notes religious connotations to words such as "profane" as meaning in front of a temple, "obscene" as in the way of a stage for religious rites, and "lewd" as in lay or non-clerical.<sup>247</sup>

According to Schauer, it was not until the sixteenth century in England that any law resembling modern obscenity law began to appear, but even that law was still primarily aimed at heresy, now religious and political, and sedition.<sup>248</sup> Professor Alpert finds general agreement that the first reported obscenity case was *The King v. Sir Charles Sedley*<sup>249</sup> in 1663.<sup>250</sup> Schauer notes the same general agreement but notes that the case is clearly distinguishable on its facts from any concern about literary obscenity.<sup>251</sup>

*Sedley* is indeed distinguishable.<sup>252</sup> Although Sir Charles Sedley did, while in a drunken state, appear naked on a balcony in London with several others who also exposed themselves in indecent postures, it appears not to have been his nakedness alone that led to his conviction. He also gave a speech containing profanities and showered the audience below with bottles of urine, causing a riot.<sup>253</sup> His conviction was "for shewing himself naked in a balcony, and throwing down bottles (pist in) vi & armis among the people in Covent Garden, contra pacem and to the scandal of

1. Colo. Stat. Ann. (1935) c. 48, § 217, derived from Act of April 9, 1885, p. 172, § 1.

2. Ind. Stat. Ann. (1934) § 2607, derived from L. 1895, c. 109.

3. S. D. Code (1939) § 13.1722(4), derived from L. 1913, c. 241, § 4.

4. Tex. Stat. (Vernon, 1936), Penal Code, Art. 527, derived from L. 1897, c. 116.

*Id.* at 523 (Frankfurter, J., dissenting); *see also infra* notes 331-34 and accompanying text.

<sup>246</sup> FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 1-3 (1976).

<sup>247</sup> TRIBE, *supra* note 198, at 19-20. Tribe does note an alternate derivation of "obscene" as adverse or ill-omened, *id.* at 19, and that "pornography" is more focused on sexual material as derived from writing about harlots, *id.* at 20; *see also infra* notes 341-80 and accompanying text, on the derivation of "obscene."

<sup>248</sup> SCHAUER, *supra* note 246, at 3.

<sup>249</sup> 83 Eng. Rep. 1146 (K.B. 1663); 82 Eng. Rep. 1036 (K.B. 1663).

<sup>250</sup> Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 40-41 (1938).

<sup>251</sup> SCHAUER, *supra* note 246, at 4.

<sup>252</sup> *See id.*; Alpert, *supra* note 250, at 42.

<sup>253</sup> *Sedley*, 83 Eng. Rep. at 1147.

the Government.”<sup>254</sup> The focus may be seen to be as much on causing violence through his “vi & armis” acts, thereby breaching the peace. Although he may have been naked, he seems to have been as intent on insulting the crowd as on appealing to their sense of the erotic.

If this is the basis of obscenity law, then as Professor Alpert says, “[a] flimsier, more appallingly pointless foundation for the superstructure of law that was later erected could hardly have been deliberately laid.”<sup>255</sup> Although the basis may or may not be flimsy, it is as good a basis for prosecuting displays of violence as it is for prosecuting displays of sexual activity.

Professor Alpert calls *Queen v. Read*,<sup>256</sup> a 1708 case, the first actual prosecution for literary obscenity.<sup>257</sup> Although *Read* did address literature rather than incitement to riot, the court rejected the idea of bringing indictments for obscenity.<sup>258</sup> In dismissing the indictment, the court said “[a] crime that shakes religion, as profaneness on the stage, &c. is indictable; but writing an obscene book, as that entitled, *The Fifteen Plagues of a Maidenhead*, is not indictable, but punishable only in the Spiritual Court.”<sup>259</sup> The publication of the book simply was not against any law. “[I]t indeed tends to the corruption of good manners, but that is not sufficient . . . to punish.”<sup>260</sup>

The next English case, in 1727, also might be argued to have failed to establish obscenity law in its modern focus on sexual or excretory activities. *Dominus Rex v. Curl*<sup>261</sup> involved a conviction for publishing the book *Venus in the Cloister, or the Nun in Her Smock*. Although the content of the book was a dialogue on lesbian love, and therefore sexual, its setting was in a convent, and therefore religious. Schauer suggests that, although the conviction might be seen as having religious overtones, the anti-religious elements were anti-Catholic rather than anti-Church of England, and therefore seem insignificant.<sup>262</sup> On the other hand, Alpert interprets the case as sustaining the indictment because of its attack on religion, and therefore able to be tried in the common law courts.<sup>263</sup> In

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<sup>254</sup> *Id.* at 1146-47.

<sup>255</sup> Alpert, *supra* note 250, at 43.

<sup>256</sup> 88 Eng. Rep. 953 (Q.B. 1708), *overruled by* *Dominus Rex v. Curl*, 2 Strange 789 (K.B. 1727).

<sup>257</sup> Alpert, *supra* note 250, at 43.

<sup>258</sup> *Read*, 88 Eng. Rep. at 953.

<sup>259</sup> *Id.*

<sup>260</sup> 92 Eng. Rep. 777 (1708) (second report of *Read*).

<sup>261</sup> 93 Eng. Rep. 849 (K.B. 1727).

<sup>262</sup> SCHAUER, *supra* note 246, at 5.

<sup>263</sup> Alpert, *supra* note 250, at 44.

Alpert's view, even with *Read*, the courts were not concerned with obscene literature but rather with punishing offenses against religion.<sup>264</sup>

In any case, English obscenity law appears to have been relatively dormant throughout the 1700s.<sup>265</sup> Both Schauer and Alpert do note the prosecution of John Wilkes in the 1760s for publishing his *Essay on Woman*,<sup>266</sup> but Schauer dismisses the case as one in which Wilkes' offenses were political and his prosecution politically motivated.<sup>267</sup> Alpert is in accord noting that the incentive to prosecute really sprang from the publication of a satirical work exposing corruption in the government, insinuating that King George III was an imbecile, and suggesting the involvement of the King's mother in an illicit relationship.<sup>268</sup> The *Essay on Woman* was only "an instrument, a stratagem, and an excuse for hostilities in the guise of a crusade."<sup>269</sup>

The state of English obscenity law at the time of the American Revolution was not focused on sexual or excretory activities. In the early 1800s, English obscenity law did begin to develop into what resembles modern law, but Professor Schauer still notes a lack of definition for obscenity until 1868.<sup>270</sup> Professor Alpert, speaking of the state of English law in 1763, says:

the first hundred years which followed Sedley's cavortings on a Covent Garden balcony yielded scarcely anything conclusive as to literary obscenity. There is no definition of the term. There is no basis of identification. There is no unity in describing what is obscene literature, or in prosecuting it. There is little more than the ability to smell it.<sup>271</sup>

Even when, in Schauer's view,<sup>272</sup> an English definition did emerge in 1868 in *Queen v. Hicklin*,<sup>273</sup> it is still not clear that such prosecutions were

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<sup>264</sup> *Id.*

<sup>265</sup> SCHAUER, *supra* note 246, at 6.

<sup>266</sup> *The King v. John Wilkes*, 95 Eng. Rep. 737 (K.B. 1764).

<sup>267</sup> SCHAUER, *supra* note 246, at 6.

<sup>268</sup> Alpert, *supra* note 250, at 44.

<sup>269</sup> *Id.* at 45.

<sup>270</sup> SCHAUER, *supra* note 246, at 7.

<sup>271</sup> Alpert, *supra* note 250, at 47. Alpert's summary might be read so as to conclude that a focus on sex did not exist. Even after the focus on sexual and excretory activities became clear in *Roth* and its progeny, Justice Stewart still could not define obscenity, but knew it when he saw it rather than smelled it. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>272</sup> SCHAUER, *supra* note 246, at 7.

<sup>273</sup> 3 L.R.-Q.B. 360 (1868).

to be limited to sexual explicitness. *Hicklin* concerned the publication of a pamphlet titled *The Confessional Unmasked; Shewing the Depravity of the Roman Priesthood, the Iniquity of the Confessional, and the Questions Put to Females in Confession*. Although the anti-Catholic theme could be seen as an extension of the censorship protection given religion,<sup>274</sup> the Lord Chief Justice presented a rather broad definition: "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."<sup>275</sup> Although the test certainly is broad enough to go beyond religious or political heresy and to encompass sexually explicit materials, it also seems broad enough to include depictions of violence, if such publications can "deprave and corrupt those whose minds are open to such immoral influences."<sup>276</sup>

The law in the colonies prior to the American Revolution also censored blasphemy and heresy, rather than obscenity in anything like its modern sense. All of the statutes prior to the Bill of Rights had such a focus.<sup>277</sup> Only one statute used the word "obscene," and it too only banned obscenity in attacks on religion.<sup>278</sup> After the adoption of the First Amendment, the statutes and cases did begin to concentrate on material with a sexual content, with the focus becoming clearer as the years passed.<sup>279</sup> Even in these years, however, Professor Schauer suggests a broad definition of obscenity.<sup>280</sup> Under the definition developed in the few pre-Civil War cases, obscene material was "whatever outrages decency and is injurious to public morals."<sup>281</sup> Although that test may include sexually obscene material, it certainly does not exclude violent material.

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<sup>274</sup> Here, too, the fact that the attack was on the Catholic church would weaken that claim. See *supra* notes 261-63 and accompanying text.

<sup>275</sup> *Hicklin*, 3 L.R.-Q.B. at 371.

<sup>276</sup> *Id.*; see *infra* notes 439-43 and accompanying text (concerning the effects of exposure to depictions of violence).

<sup>277</sup> See *supra* notes 56-103 and accompanying text; see also SCHAUER, *supra* note 246, at 8 ("All of the colonies made blasphemy or heresy a crime, by statute, but sexual materials not having an antireligious aspect were left generally untouched.") (footnote omitted).

<sup>278</sup> 1712 Mass. Bay Acts and Laws, ch. CV, § 8, 1814 Mass. Bay Colony Charters & Laws 39; see *supra* note 56 and accompanying text.

<sup>279</sup> See *supra* notes 109-95, 246-88 and accompanying text.

<sup>280</sup> SCHAUER, *supra* note 246, at 10-11.

<sup>281</sup> *State v. Rose*, 32 Mo. 560, 561 (1862); *State v. Appling*, 25 Mo. 315, 317 (1857) (quoting WILLIAM RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 46 (1857)); see also *State v. Gardner*, 28 Mo. 90 (1859) (upholding conviction for public indecency).

Professors Lockhart and McClure also note that there were few pre-Civil War cases involving obscene literature.<sup>282</sup> They interpret the lack of cases as due not to any lack of pornography; rather, the scarcity of cases meant that the issue of pornography was not seen as sufficiently important to call for censorship by the state.<sup>283</sup>

Morris Ernst traces the current widespread bans on sexually obscene materials to the early 1870s and to the work of Anthony Comstock, a "neurotic individual" who enjoyed the financial support of J.P. Morgan.<sup>284</sup> The Comstock Act,<sup>285</sup> passed with less than ten minutes of debate, "placed in a separate banned area all material which would excite sexually impure thoughts."<sup>286</sup> Even after the Comstock Act, however, at least one federal court seemed to include nonsexual material within the category of the obscene. In 1889, a person was convicted in federal court for mailing a postcard calling someone a radical, and the same court convicted another defendant for mailing a postcard to a newspaper saying, "You can take your paper and Democracy and go to hell with it."<sup>287</sup> Nonetheless, the focus on sex appeared to be developing, and Schauer finds it finally clear with the decision in *Swearingen v. United States*<sup>288</sup> in 1896 that only sexually oriented material could be obscene.<sup>289</sup>

Obscenity law, then, truly first appeared in the United States only after the adoption of the First Amendment. Even then the focus of such law was unclear. Although there are statutes and some cases dating from the pre-Civil War era, the focus on sexual or excretory activities developed only after the Civil War and the Civil War Amendments.

The statutory and case law justification for obscenity law then has its weaknesses; however, the justification for the Supreme Court's later insistence that only the erotic can be obscene is even weaker. The pre-Bill of Rights law did not ban sexual obscenity, but rather what law there was protected religion.<sup>290</sup> Laws in that era also, of course, did not ban violent

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<sup>282</sup> William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295, 324 (1954).

<sup>283</sup> *Id.* at 325.

<sup>284</sup> MORRIS L. ERNST, *THE FIRST FREEDOM* 17 (1946).

<sup>285</sup> 17 Stat. 598 (1873) (codified as amended at 18 U.S.C. §§ 1460-1469 (1988 & Supp. 1992)). Earlier Federal obscenity statutes exist, as well; see *supra* notes 161-92 and accompanying text.

<sup>286</sup> ERNST, *supra* note 284, at 17-18.

<sup>287</sup> SCHAUER, *supra* note 246, at 18 (citing *United States v. Davis*, 38 F. 326 (W.D. Tenn. 1889) (postcard to "radical"); *United States v. Olney*, 38 F. 326, 328 (W.D. Tenn. 1889) (postcard to newspaper)).

<sup>288</sup> 161 U.S. 446 (1896).

<sup>289</sup> *Id.* at 451.

<sup>290</sup> See *supra* notes 54-113 and accompanying text.

material. Despite this, if the existence of limitations on speech regarding religion serves as a basis for later bans on sexual obscenity, there is no reason why the same laws cannot also serve as a basis for a ban on depictions of violence.

Any such focus on sex found after the Bill of Rights is irrelevant to federal law; however, there might be some relevance in the Civil War and post-Civil War era law to the constitutionality of state obscenity law. The existence of state law on the subject might be used to argue that the Fourteenth Amendment was not intended to incorporate any first amendment protection for obscene materials. That argument would be of interest, however, only if the federal government could not ban the sexually obscene. Since *Roth* concludes that the sexually obscene enjoys no first amendment protection there is nothing to incorporate against the states.

It is clear that there is a long history of bans on some forms of speech. The Court used that history to show that not all speech is constitutionally protected.<sup>291</sup> The Court's history of obscenity law in *Roth* was an attempt to show that obscenity was within that class of unprotected speech. Yet, an equally compelling history can be presented for depictions of violence being unprotected speech.<sup>292</sup>

Since there is no early legal history specifically showing that sexually obscene material was unprotected, there is no need to show that depictions of violence were specifically unprotected in the era of the Bill of Rights. In the post-Bill of Rights era, in which obscenity law began to develop but was not limited to sexual material, such laws support a ban on violence as well as they support a ban on sexual material. To show an equal history, it suffices to show that laws against depictions of violence developed in the same era in which the laws became clear in their bans on sexual material. Since the ban on, and limitation to, sexual material became clear in the post-Civil War era, that is also the relevant era in which to look for laws against the depiction of violence.

The post-Civil War era does provide a series of statutes banning the distribution of violent material. Interestingly, the New York statute in that era, struck down as vague in *Winters v. New York*,<sup>293</sup> was enacted due to the efforts of the New York Society for the Suppression of Vice and the New York Society for the Prevention of Cruelty to Children,<sup>294</sup> the

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<sup>291</sup> See *supra* notes 56-200 and accompanying text.

<sup>292</sup> An analysis of the meaning of "obscenity" and of what historically has been considered obscene in drama, including depictions of violence, is presented *infra* notes 359-78 and accompanying text.

<sup>293</sup> 333 U.S. 507 (1948); see *supra* notes 205-21 and accompanying text.

<sup>294</sup> *Winters*, 333 U.S. at 520-21 n.1 (Frankfurter, J., dissenting).



organization established by the anti-obscenity crusader Anthony Comstock.<sup>295</sup>

In his dissent in *Winters*, Justice Frankfurter cited nineteen other state statutes nearly identical to that found to be unconstitutionally vague.<sup>296</sup> He cited four others as being substantially similar.<sup>297</sup> As Justice Frankfurter noted, the Connecticut statute he cited, with a lineage dating to 1885, was repealed by the time the *Winters* decision was issued.<sup>298</sup> The statute, however, had banned the distribution or possession with intent to distribute “any book, magazine, pamphlet or paper, devoted to the publication, or principally made up of, criminal news, police reports or pictures and stories of deeds of bloodshed, lust or crime . . . .”<sup>299</sup> The statute was contained in a chapter titled *Offenses Against Humanity and Morality* and followed sections on blasphemy and obscenity.<sup>300</sup>

The Illinois<sup>301</sup> and Iowa<sup>302</sup> statutes, derived from 1889 and 1886 enactments respectively, both used nearly identical language in describing the banned material,<sup>303</sup> but limited the bans to distribution and exhibition to minors. The Iowa statute is of interest in that the title of the section was, *Giving or showing obscene literature to minors*.<sup>304</sup> At least in Iowa in that era, the word “obscene” would appear not to be limited to depictions of sexual or excretory activities, but also would include depictions of crime.

The Kansas statute derived from another 1886 statute. That statute dropped “lust” from the description of banned descriptions of criminality, banning depictions of “bloodshed or crime.”<sup>305</sup> The Act applied to adults, as well as to minors, and again seemed to consider the material obscene, as the section title was *Dealing in obscene literature*.<sup>306</sup>

The Kentucky statute, dating from 1894, again used language nearly identical to that of New York and Connecticut in describing the banned

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<sup>295</sup> SCHAUER, *supra* note 246, at 12.

<sup>296</sup> *Winters*, 333 U.S. at 522-23 (Frankfurter, J., dissenting); *see supra* note 244.

<sup>297</sup> *Id.* at 523 (Frankfurter, J., dissenting); *see supra* note 245.

<sup>298</sup> *Id.* at 512.

<sup>299</sup> 1930 CONN. GEN. STAT., ch. 329, § 6245 (derived from 1885 Conn. Pub. Acts, ch. 47, § 2, repealed by 1935 Conn. Pub. Acts 216).

<sup>300</sup> *See generally* 1930 CONN. GEN. STAT. ch. 329.

<sup>301</sup> ILL. ANN. STAT. ch. 38, para. 106 (Smith-Hurd 1908) (derived from Act of June 3, 1889, p. 114, § 1).

<sup>302</sup> IOWA CODE § 725.8 (1946) (derived from 1886 Iowa Acts 177, § 4).

<sup>303</sup> “Bloodshed” is omitted from the Iowa statute, which instead reads “immoral deeds, lust or crime.” *Id.*

<sup>304</sup> IOWA CODE § 725.8.

<sup>305</sup> KAN. STAT. ANN. § 21-1102 (1935) (derived from 1886 Kan. Sess. Laws 101, § 1).

<sup>306</sup> *Id.*

material.<sup>307</sup> It criminalized distribution, exhibition, or possession with such intent.<sup>308</sup> Although the statute added a provision that use of a minor in such distribution or exhibition was also an offense,<sup>309</sup> the statute does not appear to have been limited to distribution or exhibition to minors. The Kentucky statute is illustrative of the fact that, although the statutes cited in the *Winters* dissent had language nearly identical to the New York statute, the earlier statutes from which they derived had the same effect but used different language. The early Kentucky statute made it illegal to publish or distribute "any paper, book, or periodical, the chief feature or characteristics of which is to record the commission of crimes, to display, by cuts or illustrations, crimes committed, the actors, pictures of criminals, desperados, [or] fugitives from justice . . . ."<sup>310</sup>

The Maine,<sup>311</sup> Maryland<sup>312</sup> and Massachusetts<sup>313</sup> statutes, derived from 1885, 1894, and 1885 statutes respectively, all addressed distribution or exhibition to minors. While the Maine section title is *Circulation among minors of criminal news and obscene pictures*,<sup>314</sup> the title probably indicates more of a grouping of two sorts of violations rather than an inclusion of depictions of criminality within the obscene.

Although the Michigan statute,<sup>315</sup> derived from an 1885 statute, applied to distribution to adults as well as to minors, the Minnesota<sup>316</sup> and Missouri<sup>317</sup> statutes, also derived from 1885 statutes, addressed only distribution to minors. Although the Montana<sup>318</sup> and Nebraska<sup>319</sup> statutes, derived from 1891 and 1887 statutes respectively, are also limited to minors, their titles are again of interest. The Montana statute was titled

<sup>307</sup> KY. REV. STAT. ANN. § 436.110 (Baldwin 1946) (derived from 1891-1893 Ky. Acts 182, § 217).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> 1891-1893 Ky. Acts 182, § 217. The section also banned depictions of "men and women in improper dress, lewd and unbecoming positions, or men and women influenced by liquors, drugs, or stimulants." *Id.*

<sup>311</sup> ME. REV. STAT. ANN. tit. 121, § 27 (West 1944) (derived from 1885 Me. Laws 348, § 1).

<sup>312</sup> MD. ANN. CODE art. 27, § 496 (1939) (derived from 1894 Md. Laws 271, § 2).

<sup>313</sup> MASS. GEN. LAWS ANN. ch. 272, § 30 (West 1933) (derived from 1885 Mass. Acts 305).

<sup>314</sup> ME. REV. STAT. ANN. tit. 121, § 27.

<sup>315</sup> MICH. STAT. ANN. § 28.576 (Callaghan 1938) (derived from 1885 Mich. Pub. Acts 138).

<sup>316</sup> MINN. STAT. ANN. § 617.72 (West 1945) (derived from 1885 Minn. Laws 268, § 1).

<sup>317</sup> MO. REV. STAT. § 4656 (1939) (derived from 1885 Mo. Laws 146, § 1).

<sup>318</sup> MONT. CODE ANN. § 11134 (1935) (derived from 1891 Mont. Laws 255, § 1).

<sup>319</sup> NEB. REV. STAT. § 28-924 (1943) (derived from 1887 Neb. Laws 113, § 4).

*Obscene literature not to be given to or sold by minors*,<sup>320</sup> and the Nebraska statute was titled *Obscene or criminal books; possession with intent to exhibit or sell, sale to minors*.<sup>321</sup> The Nebraska title distinguishes the two classes of material, though punishing both.<sup>322</sup> The Montana statute, however, appears to include depictions of criminality within the obscene.

The North Dakota statute, tracing its origins to an 1895 statute, is contained in a section titled *Buying, Selling, and Designing Obscene Literature*.<sup>323</sup> The section applies to adults, as well as to minors, and includes a ban on material "devoted principally or wholly to the publication of criminal news or pictures or stories of deeds of bloodshed or crime . . . ."<sup>324</sup> The Ohio statute, with an 1885 genesis, applies only to minors, but also includes "obscene" within its title—*Disposing of, exhibiting, advertising, etc., obscene literature or drugs for criminal purposes*.<sup>325</sup>

Although Oregon's statute, with an 1885 derivation, includes "obscene" within the section title, it does so as one of two classes, the other being "exploitation of crime."<sup>326</sup> The statute has no age limitation and bans any "publication that purports to relate or narrate the criminal exploits of any desperate or convicted felon, or any book, paper, or other publication that is principally devoted to, or contains, or is made up in part of, accounts or stories of crime or lust or deeds of bloodshed . . . ."<sup>327</sup>

Among the last three statutes cited as identical, the Pennsylvania law,<sup>328</sup> dating from 1887, applied only to minors. The Washington statute, derived from a 1909 statute, applied to adults, and the section was titled simply *Obscene literature*.<sup>329</sup> Lastly, the Wisconsin statute, based on an 1899 law, used language like that in New York in a statute applying to any distribution of such materials.<sup>330</sup>

The four statutes cited by Justice Frankfurter as substantially similar also provide support for the proposition that many of the states had chosen to ban depictions of violence. The Colorado statute, which originated in

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<sup>320</sup> MONT. CODE. ANN. § 11134.

<sup>321</sup> NEB. REV. STAT. § 28-924.

<sup>322</sup> *Id.*

<sup>323</sup> N.D. CENT. CODE § 12-2109 (1943) (derived from 1895 N.D. Laws 84, § 1).

<sup>324</sup> *Id.*

<sup>325</sup> OHIO REV. CODE ANN. § 13035 (Baldwin 1940) (derived from 1885 Ohio Laws 184).

<sup>326</sup> OR. REV. STAT. § 23-924 (1940) (derived from 1885 Or. Laws 126).

<sup>327</sup> *Id.*

<sup>328</sup> PA. STAT. ANN. tit. 18, § 4524 (1945) (derived from 1887 Pa. Laws 84, § 2).

<sup>329</sup> WASH. REV. CODE § 2459(2) (1932) (derived from 1909 Wash. Laws 249, § 207(2)).

<sup>330</sup> WIS. STAT. § 351.38(4) (1945) (derived from 1901 Wis. Laws 256).

1885, included a ban on publishing “by pictures or descriptions, indecent or immoral details of crime.”<sup>331</sup> Here too, “obscene” was included in the title of the section. The Indiana statute also is supportive. It derives from an 1895 statute and bars the publishing or distribution of “any paper, book or periodical the chief feature or characteristic of which is the record of commission of crime or the display by cut or illustration of crimes committed or of the acts or pictures of criminals [or] desperados . . . .”<sup>332</sup>

The 1913-based South Dakota statute makes it unlawful to “[p]resent[] by or with moving pictures or in any manner any stories or scenes illustrating illicit love, infidelity in family relations, murder, or striking an officer of the law, which are suggestive of crime and immorality . . . .”<sup>333</sup> Most questionable in its support is the Texas statute. That statute, derived from an 1897 statute, bars material “devoted mainly to the publications of scandals, whoring, lechery, assignations, intrigues between men and women and immoral conduct of persons . . . .”<sup>334</sup> Although criminality may be immoral, it is not clear that the aim of the statute is a ban on depictions of crime.

The statutes cited by Justice Frankfurter provide an insight into the legal climate in the post-Civil War era, up to the 1948 *Winters* decision. Prior to the late 1800s, there were bans on obscene materials, but it was unclear what material was included within the category of the obscene.<sup>335</sup> It is only with the 1896 decision in *Swearingen v. United States*<sup>336</sup> that Professor Schauer finds that obscenity clearly was limited to sexually oriented material.<sup>337</sup> In that same era, a significant number of states passed statutes banning depictions of criminal acts.<sup>338</sup> Some of those statutes, those using “obscene” in their titles, may be viewed as an insistence that the category of the obscene is not so limited. Other states, by enacting statutes addressed to material no longer covered by obscenity statutes, may be seen as wishing to ban such material without being concerned about the label to be applied.

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<sup>331</sup> COLO. REV. STAT. ANN. § 217 (West 1935) (derived from 1885 Colo. Sess. Laws 172, § 1).

<sup>332</sup> IND. CODE ANN. § 10-2805 (Burns 1934) (derived from 1895 Ind. Acts 109). The section goes on to apply to illustrations of “men or women in lewd and unbecoming positions or improper dress.” *Id.*

<sup>333</sup> S.D. CODIFIED LAWS ANN. § 13.1722(4) (1939) (derived from 1913 S.D. Laws 241, § 4).

<sup>334</sup> TEX. PENAL CODE ANN. § 527 (West 1936) (derived from 1897 Tex. Gen. Laws 116).

<sup>335</sup> See *supra* notes 246-88 and accompanying text.

<sup>336</sup> 161 U.S. 446 (1896).

<sup>337</sup> See *supra* note 288 and accompanying text.

<sup>338</sup> See *infra* notes 343-84 and accompanying text.

## IV. NON-LEGAL DEFINITIONS OF "OBSCENE"

The examination of statutory and case law showed that the concept of obscenity had not been defined with any clarity prior to the late 1800s.<sup>339</sup> The law did, however, use the word "obscene" without providing a definition, in earlier cases and statutes.<sup>340</sup> Some light might be shed on the meaning of the term in those cases and statutes by an examination of the derivation of the word and its use in ordinary language.<sup>341</sup>

There is some disagreement over the derivation of the word "obscene." One derivation suggested by commentators is from *ob caenum* which would be "on account of filth" or simply "filth."<sup>342</sup> An alternative is from *ab scaena* or "off the stage," which might mean either "not to be openly shown on the stage of life"<sup>343</sup> or alternatively, "off the theatrical stage."<sup>344</sup>

If the derivation is taken as relating to filth, it is unclear to what the word ought to apply. Although some ordinary uses of the word "filth" would justify including depictions of excretory activities within the concept of obscenity, why should depictions of sexual activities be so included? Since the results of excretory activities may qualify as filth, the ban on depictions of such acts might be "on account of filth." Sexual acts are, however, not themselves filth or filthy, so why would depictions of sexual acts be banned "on account of filth"? Furthermore, if the products of one's entrails are filth and depictions of the production may be banned, ought not the entrails themselves be considered filth and depictions of their exposure through a violent attack on the abdomen banned?

Certainly not all sexual acts are filthy, and a ban on all depictions of sexual acts cannot be justified "on account of filth." Professor Nahmod

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<sup>339</sup> See *supra* notes 246-88 and accompanying text.

<sup>340</sup> See *supra* notes 107-37 and accompanying text.

<sup>341</sup> Dictionaries of an earlier era may not be of much use. Samuel Johnson defined "obscene" as "Immodest; not agreeable to chastity of mind; causing lewd ideas[;] Offensive; disgusting[;] Inauspicious; ill omened." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773). Although "immodest" and "lewd" may point toward sexual material, "offensive" and "disgusting," let alone "inauspicious" and "ill omened," may not be so limited.

<sup>342</sup> See, e.g., HARRY M. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LIBERAL SOCIETY 210 (1969); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 7 (1985).

<sup>343</sup> CLOR, *supra* note 342, at 210 (citing HAVELOCK ELLIS, ON LIFE AND SEX 100 (1922)).

<sup>344</sup> See, e.g., WALTER ALLEN, TO DEPRAVE AND CORRUPT 147 (1962) ("Obscenity seems originally to have meant that which could not be represented upon the stage. It is related to ancient Greek theories of drama . . .") (quoted in KUH, *supra* note 241, at 336-37 n.1).

has, in fact, suggested an interesting justification for obscenity laws, based not on the filth of sex but on its sacredness. In his view,

the obscenity exception to the First Amendment may . . . be explained in large measure as carving out an area in which the state is permitted to maintain the sacred aspect of sexuality so as to prevent private market forces from debasing, commercializing and effectively desacralizing it. Thus, certain kinds of obscenity are excluded from First Amendment coverage not because they have little or no value but rather because they have such high value that they are sacred.<sup>345</sup>

Although it may be debatable whether the suggested rationale justifies a first amendment exception, Professor Nahmod's approach is certainly based on a healthier attitude toward sex than are those approaches that would create the exception because of the filth which is depicted.

Of course, not all depictions of sexual activity are banned as obscene. Only those appealing to the prurient or shameful interests may be banned.<sup>346</sup> It may be tenable to argue that some sexual activities or aspects of those activities are filthy, and an interest in those acts or aspects are shameful. If obscenity is to be based on filth, then some way of defining which acts or aspects are filthy must be presented.

Professor Clor presents a definition of obscenity that responds to some of these concerns. Clor suggests a definition that appears to encompass both the "on account of filth" and the "off the stage of life" approaches. In his discussion, he offers two preliminary definitions of obscenity. "[O]bscenity consists in making public that which is private; it consists in an intrusion upon intimate physical processes and acts or physical-emotional states; and [secondly] it consists in a degradation of the human dimensions of life to a sub-human or merely physical level."<sup>347</sup> The two definitions are related in that "when the intimacies of life are exposed to public view their human value may be depreciated."<sup>348</sup>

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<sup>345</sup> Sheldon H. Nahmod, *Adam, Eve and the First Amendment: Some Thoughts on the Obscene as Sacred*, 68 CHI.-KENT L. REV. 377, 378 (1992). Interestingly, Professor Nahmod's justification is perhaps unique in not being applicable to depictions of violence, which few would argue are sacred experiences that would be cheapened by media depictions.

<sup>346</sup> *Id.* at 380 (quoting *Roth v. United States*, 354 U.S. 476, 487, 489 (1957)).

<sup>347</sup> CLOR, *supra* note 342, at 225.

<sup>348</sup> *Id.*

The relationship of the second definition to filth can be found in Clor's analysis of a passage from Joseph Heller's *Catch 22*. In the passage, Yossarian discovers a wounded friend, disemboweled but still barely alive. Seeing the friend's entrails, as life and spirit slip away, Yossarian concludes that "man is garbage."<sup>349</sup> The conclusion seems to be not that the human body contains garbage, physical material that will eventually decompose, but rather that the body viewed as purely physical, as divorced from human spirit, is garbage. This is, for Clor, the nub of obscenity. "Obscene literature may be defined as that literature which presents, graphically and in detail, a degrading picture of human life and invites the reader or viewer, not to contemplate that picture, but to wallow in it."<sup>350</sup>

Clor's analysis is insightful. It is the depiction of the human spirit that distinguishes a romantic film, even a romantic film depicting explicit sex, from the depictions of explicit sex that might make another film obscene. In the sexually obscene film, man and, more commonly, woman are reduced to the subhuman, merely physical level—reduced to garbage or filth. It is not the sexual act, but rather the focus solely on the physical aspects of that act, that is filth.

Professor Clor also suggests that it is the purely physical side of human existence that humans choose to remove from the stage of life. "The element of obscenity . . . consists in one's being 'too close' to other persons performing intimate physical acts."<sup>351</sup> We withhold from the view of others, and wish others to withhold from our view, those acts that are governed by animal urges rather than the human spirit or in which the observer can experience only the subhuman aspects of the act.<sup>352</sup>

There are certain bodily acts which will tend to arouse disgust in an observer who is not involved in the act and is not, at the time subject to its urgencies. What the observer sees is a human being governed by physiological urges and functions. Now, to the participants, the act . . . can have important personal and supra-biological meanings. But the outside observer cannot share the experience of these meanings; what he sees is simply the biological process.<sup>353</sup>

This view explains the private nature of sex, as well as the privacy commonly accorded excretory activities. In the non-romantic physical

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<sup>349</sup> *Id.* at 231 (quoting JOSEPH HELLER, *CATCH 22* at 449-50 (1962)).

<sup>350</sup> *Id.* at 234.

<sup>351</sup> *Id.* at 225.

<sup>352</sup> *Id.* at 225-26.

<sup>353</sup> *Id.* at 226.

urges of lust and in the need to eliminate, the human being is governed by the same subhuman urges that affect animals. The reduction to subhuman, to garbage, or to filth causes us to bar such activities from the open stage of life.

What has been said of sex and excretion also can be applied to other physical needs, drives, or inevitability. "[T]here can be . . . obscene views of death, of birth, of illness, and of acts such as eating . . . . Obscenity makes a public exhibition of these phenomena and does so in a way that their larger human context is lost or depreciated."<sup>354</sup> Obscenity is not limited to sexual or excretory activities. "[O]bscene literature is that literature which invites and stimulates the reader to adopt the obscene posture toward human existence—to engage in the reduction of man's values, functions, and ends to the animal or subhuman level."<sup>355</sup>

Just as there is a difference between a sexually explicit romance and sexual obscenity, there is a difference between a death scene and violent obscenity. Sexual obscenity focuses on the physical aspects of sexuality, while neglecting the aspects reflecting the human spirit. Romance focuses on one of the highest aspects of that spirit. A death scene can certainly focus on the human spirit, personal relationships, the meaning and intransigence of life, or any of a myriad of other facets of the human spirit or experience. On the other hand, such a scene can depict solely the physical side of death. To the degree that the depiction is purely physical, to the degree that the depiction presents the end of a person's life as though it were the end of subhuman life, to the degree that the person is shown as purely physical garbage, to that degree the depiction is obscene.<sup>356</sup>

Clearly, Clor's analysis shows why, under the "on account of filth" or the "removed from the stage of life" derivation of "obscene," violence may be obscenity. To treat the human body as fodder for a chain saw is to exclude the humanity of the victim of that violence. It is to treat the person as subhuman, garbage, or filth. As such, it also is removed from the stage of life. Although a person may wish to die peacefully in the company of loved ones, that desire is based on elements of the human spirit. Although presumably preferring to avoid the experience altogether, if a person is to be dismembered or disemboweled, the experience is less likely one the victim would want to share. The first death has its focus in the human spirit; the second is subhuman.

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<sup>354</sup> *Id.* at 225.

<sup>355</sup> *Id.* at 230.

<sup>356</sup> That is not to say that subhuman, animal life is garbage. Films can quite movingly depict the death of an animal, but do so most effectively when they focus on the spirit of the animal. To the degree that the animal has spirit, that is in the higher animals, scenes of animal mutilation, like slasher films, might be viewed as obscene.



Recognizing that his approach extends to violence, Clor includes violence within his definition of obscenity. An obscene depiction is "one which tends predominantly to . . . [v]isually portray in detail, or graphically describe in lurid detail, the violent physical destruction, torture, or dismemberment of a human being, provided this is done to exploit morbid or shameful interest in these matters and not for genuine scientific, educational, or artistic purposes."<sup>357</sup> He also would include in his definition a similarly lurid depiction of death or of a dead body.<sup>358</sup>

The other derivation suggested for "obscene" was "off the stage," in the sense of the theatrical stage. This approach has the advantage of making claims that obscene material does not enjoy the protections of freedoms of speech or press almost tautological. If obscene material is that material that has been banned from the stage, then obviously such material has not been protected. If that is the derivation, a look at the materials historically banned from the stage is required.

The examination begins with the origins of Western drama in the Greek theater. The Greeks are said to have been quite tolerant of sexual and scatological themes in comedies but intolerant of violence, however the comparison may be flawed. Although it may be, as "D.H. Lawrence declared[,] that 'some of Aristophanes shocks everybody today, and didn't galvanize the later Greeks at all,'"<sup>359</sup> the material spoken of is described as "bawdy blasphemy."<sup>360</sup> A toleration for bawdy speech, even when blasphemous, does not necessarily imply a toleration for the explicit acts of modern sexual obscenity.

The Greeks were similarly tolerant of descriptions of violence. Narrative poetry and drama contain such oral depictions.<sup>361</sup> What Greek drama appeared not to accept was the visual depiction of violent death.<sup>362</sup> According to Professor Flickinger, "[t]he Greek theater suffered no scene of bloodshed to be enacted before its audience. When the plot of the play . . . required such an incident, the harrowing details were narrated by a

<sup>357</sup> CLOR, *supra* note 342, at 245.

<sup>358</sup> *Id.*

<sup>359</sup> TRIBE, *supra* note 198, at 32 (quoting D.H. LAWRENCE, *PORNOGRAPHY AND OBSCENITY* 5-6 (1929)).

<sup>360</sup> *Id.*

<sup>361</sup> See, e.g., H.C. BALDRY, *THE GREEK TRAGIC THEATRE* 50 (1971) ("The ancient Greeks were not squeamish about violence or death: from the *Iliad* onwards bloodshed was a commonplace in narrative poetry . . ."); see also *infra* notes 363-65 and accompanying text.

<sup>362</sup> See, e.g., Charles Segal, *Violence and Dramatic Structure in Euripides' Hecuba*, in *VIOLENCE IN DRAMA* 35, 35 (James Redmond ed., 1991) ("Greek drama, on the whole, avoids the direct visual depiction of violence on the stage.").

messenger who had witnessed the event."<sup>363</sup> Professor Arnott is in accord: "We are led up to the point where some violent deed is going to take place, given the motives for the deed and the story behind it, but the deed itself takes place off stage."<sup>364</sup>

It has been suggested that the unwillingness to portray violence may have been based on the small number of actors involved in Greek dramas. Since there was no curtain, it is true that the actor who died on stage would have to arise at the end of the scene to appear later in another role.<sup>365</sup> Professor Arnott, however, finds the convention to be based in aesthetics or taste.<sup>366</sup> Flickinger agrees:

It is customary to explain the Greek avoidance of violence on aesthetic grounds; to assert that the susceptibilities of the Greeks were so refined as to have been offended by scenes of bloodshed. That which would be disagreeable or painful to see in real life should never be presented to an audience.<sup>367</sup>

There are also those who would question the conclusion that scenes of violent death were confined to the offstage—were obscene. Professor Walton notes that not all violence occurred offstage and that "Greek tragedy does contain scenes of physical assault, suffering, and even death, to be presented in full view of the audience."<sup>368</sup> Walton cites in support of his conclusion Prometheus' death in an earthquake, and the suicides of Ajax and Evadne.<sup>369</sup> However, even those accepting the rule against violence note an exception for suicide, death as the result of natural events, or at the hands of the gods.<sup>370</sup> It is homicide that could not be shown. It was the violence of person against person that was obscene.

<sup>363</sup> ROY C. FLICKINGER, *THE GREEK THEATER AND ITS DRAMA* 127-28 (4th ed. 1936).

<sup>364</sup> PETER D. ARNOTT, *AN INTRODUCTION TO THE GREEK THEATRE* 22 (1959).

<sup>365</sup> See PETER D. ARNOTT, *GREEK SCENIC CONVENTIONS IN THE FIFTH CENTURY B.C.* 130 (1962); FLICKINGER, *supra* note 363, at 129.

<sup>366</sup> ARNOTT, *supra* note 364, at 22 ("It is usually held that Greek taste forbade the representation of death in view of the audience." ).

<sup>367</sup> FLICKINGER, *supra* note 363, at 130.

<sup>368</sup> J. MICHAEL WALTON, *GREEK THEATRE PRACTICE* 135 (1980).

<sup>369</sup> *Id.* at 135-36.

<sup>370</sup> FLICKINGER, *supra* note 363, at 129 ("The rule of Greek dramaturgy which has just been described is liable to one notable exception—the dramatic characters may not commit murder before the eyes of the spectators but they may commit suicide there." ); *id.* at 132 ("[T]he taboo . . . prevented one actor from murdering another upon the stage. But this taboo did not protect an actor against himself or against the assaults of nature or of the gods. Hence suicides and natural deaths were permissible within the audience's sight, though homicides were not." ).

If "obscene" means banned from the stage, then the classical view of obscenity included violence. Again, despite claims that the Greeks were tolerant of sexual themes, it may be a mistake to conclude that materials obscene under modern law would have been accepted. Even if such sexually explicit matter would have been considered obscene, however, so also was violence.

The later theater appears not to have been so averse to violence. In medieval drama violence seems common:

In the name of sacred instruction and secular diversion, the Apostles were graphically stoned, stabbed, blinded, crucified, and flayed. Other holy men and women variously and vigorously had their teeth wrenched out, their breasts torn off, and their bodies scourged, shot with arrows, baked, grilled, and burned. Audiences were also treated to bestial scenes of infanticide, and to broad comedies about divinely mutilated Jews. No torment was too extreme or too gory for representation, as medieval drama ignored the classical tenet, advanced by Horace, of not bringing upon the stage what should be performed behind the scenes.<sup>371</sup>

The religious lessons of the violent *mysteres* might justify, without really changing the rule, an exception from the classical view of the obscene. Just as death at the hands of the gods was not obscene, death for the cause of God also might be non-obscene. Public execution, however, also became popular entertainment. Although such executions may serve an educational, deterrent purpose, that the people of Mons purchased a criminal from a nearby town so that they could see him executed<sup>372</sup> may indicate more of an interest in entertainment. It may simply be that the "[m]iracle plays and *mysteres* were violent theatre for a violent era"<sup>373</sup> and that the view of obscenity had changed.

It is also the case that the classics of English drama contained violence. Shakespeare's plays certainly contain scenes of violence.<sup>374</sup> Although "[c]ompared to his predecessors . . . Shakespeare seems not much addicted to violence . . . rarely go[ing] in for bizarre forms of it, as do a

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<sup>371</sup> John Gatton, "There Must Be Blood": *Mutilation and Martyrdom on the Medieval Stage*, in *VIOLENCE IN DRAMA*, *supra* note 362, at 79.

<sup>372</sup> *Id.* at 80.

<sup>373</sup> *Id.*

<sup>374</sup> See generally Jonas Barish, *Shakespearean Violence: A Preliminary Survey*, in *VIOLENCE IN DRAMA*, *supra* note 362, at 101, 102.

number of earlier and later playwrights,"<sup>375</sup> murder is not uncommon. Although the goriness of the medieval era is missing, it may still be somewhat less violent theater for a somewhat less violent era.

In later continental theater, Flickinger argues that the Greek aesthetic objection to violence carried over to French drama in the early part of the twentieth century:

This is the French position. . . . "A character in [French] tragedy could be permitted to kill himself, whether he did it by poison or steel: what he was not suffered to do was to kill someone else. And while nothing was to be shown on the stage which could offend the feelings through the medium of the eyes, *equally was nothing to be narrated with the accompaniment of any adjuncts that could possibly arouse disagreeable sensations in the mind.*"<sup>376</sup>

On the other hand, starting in the same era, from 1897 to 1962, and in the same country, the Grand-Guignol Theater in Paris "was devoted to horror plays designed to terrorize and amuse its audiences."<sup>377</sup> "[T]he Guignolers [went] happily . . . about their business of gouging out one another's eyes, cooking villains in vats of sulphuric acid, hurling vitriol and cutting throats, all to the accompaniment of hysterical laughter and hideous shrieks."<sup>378</sup>

Although the classical view may have been that violence is obscene, views of violence as obscenity seem to have varied with the times; of course, the same is true of sexual activities as obscenity. Professor Kuh cites the psychologists Eberhard and Phyllis Kronhausen as having determined that "exhibitions of human intercourse for the entertainment of special guests were not at all rare occurrences . . . through part of the 18th century in France, and it is well to remember that these exhibitions took place before mixed audiences of men and women."<sup>379</sup>

As either an aesthetic or moral concept, the focus of obscenity has changed over time. What was acceptable on the stage in one era may be unacceptable in another. What is clear is that "obscene" as banned from

<sup>375</sup> *Id.*

<sup>376</sup> FLICKINGER, *supra* note 363, at 130 (quoting THOMAS R. LOUNSBURY, *SHAKESPEARE AS A DRAMATIC ARTIST* 175 (1902)).

<sup>377</sup> John Callahan, *The Ultimate in Theatre Violence*, in *VIOLENCE IN DRAMA*, *supra* note 362, at 165.

<sup>378</sup> *Id.* (quoting *Speaking of Pictures*, LIFE, Apr. 28, 1947, at 15).

<sup>379</sup> KUH, *supra* note 241, at 4 (quoting EBERHARD KRONHAUSEN & PHYLLIS KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 66-67 (1964)).

the stage does not have a sole application to sexual or excretory activities. Such activities may only be talked about in some eras, with more or less explicitness, but they could be graphically displayed in other eras. The same is true of violence; it could only be described in Greek drama but could be shown in gory detail in other eras. Obscenity is broader than sex and excretion. As Professor Schauer says, "[o]bscene" refers to that which is repugnant or disgusting to the senses, or offensive, filthy, foul, repulsive, or loathsome. . . . It is not incorrect to say that war or gory violence is obscene . . . ."<sup>380</sup>

#### V. POLICY BASES FOR BANNING THE OBSCENE

In addition to the historical bases for banning the obscene, the *Roth* Court and various commentators have presented policy reasons for denying first amendment protection to obscene materials. The policy analysis has been limited to the consideration of depictions of sexual activity, but the policy reasons carry over with equal weight to violence as obscenity.

The policy reasons for denying first amendment protection to obscene material, as presented by the *Roth* opinion, had an historical flavor. Policy concerns expressed by the Framers have extremely strong standing as explanations for the scope of the protections enacted in response to those concerns. In its search for policy, the Court says that the first amendment speech and press protections were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>381</sup> As evidence for that proposition, the opinion quotes a 1774 letter from the Continental Congress to the people of Quebec:

The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.<sup>382</sup>

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<sup>380</sup> FREDERICK F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 179 (1982).

<sup>381</sup> *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>382</sup> *Id.* (quoting 1 J. CONTINENTAL CONGRESS 108 (1774)).

This rationale appears similar to what Professor Blasi calls the "checking value" of the First Amendment, the role that "free speech, a free press, and free assembly can serve in checking the abuse of power by public officials."<sup>383</sup> It also reflects Professor Meiklejohn's similar, though distinct, theory that for speech to enjoy first amendment protection, it should be related to self-governance.<sup>384</sup> The difference between the two theories seems to hinge on Meiklejohn's regular active role of the citizen and Blasi's more exceptional role of the citizen.<sup>385</sup>

Blasi does appear to recognize other values behind the first amendment protections of speech and press. He identifies four core values behind the First Amendment: furtherance of self-government, individual autonomy, providing for a check on government, and creating a marketplace of ideas.<sup>386</sup> At least one, and perhaps two, of these values would not be encompassed within the checking value. Nonetheless, he says: "[I]f one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate."<sup>387</sup>

Although the "checking value" theory does identify an important area that must lie at the core of any first amendment protections, the argument that the protection of the Amendment must be limited to that area is more difficult to make. Blasi does offer such an argument. He suggests that courts should adopt a "pathological perspective" toward the First Amendment.<sup>388</sup> It should be interpreted to provide maximum protection in periods of intolerance and should be targeted for the worst of times.<sup>389</sup> Although he recognizes that there may be an argument for expansive readings in normal times, so that it might prove difficult to cut back on an amendment of wide application, he rejects that conclusion.<sup>390</sup> He instead eventually adopts a position that "[b]etter equipped for the storms of

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<sup>383</sup> Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527. Blasi cites the same letter to the inhabitants of Quebec cited by the *Roth* opinion.

<sup>384</sup> See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

<sup>385</sup> See Blasi, *supra* note 383, at 542 (basing the checking approach on democratic theory, but differing from Meiklejohn's approach in that "the role of the ordinary citizen is not so much to contribute on a continuing basis to the formation of public policy as to retain a veto power to be employed when the decisions of officials pass certain bounds").

<sup>386</sup> *Id.* at 524, 527.

<sup>387</sup> *Id.* at 527.

<sup>388</sup> Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

<sup>389</sup> *Id.* at 449-50.

<sup>390</sup> *Id.* at 477.

pathology might be a lean, trim First Amendment that covered only activities most people would recognize as serious, time-honored forms of communication.”<sup>391</sup>

The “checking value” or self-governance view of the scope of first amendment protection would deny such protection to sexual obscenity, as the Court holds in *Roth*.<sup>392</sup> Although pornography may be used as a medium for political expression, obscenity in the *Roth* definition was limited to material totally lacking in social, including political, importance. Even under the *Miller* definition, pornography is only obscene if it “lacks serious literary, artistic, political, or scientific value.”<sup>393</sup> If material is obscene, it is not seriously political pornography and would not enjoy protection.

The important point here is that, just as sexual obscenity lacks protection under the “checking value” or self-governance theories, so also does violent obscenity, if properly defined. If the *Miller* definition is adapted to allow a ban on explicit depictions of violence only when such depictions lack “serious literary, artistic, political, or scientific value,”<sup>394</sup> any work considered violent obscenity by definition would not have serious political value. Just as sexually obscene works without serious political value are unprotected under the “checking value” limitation, violently obscene works lack serious political value and are similarly unprotected.

If the values found so central by Blasi and Meiklejohn provided the limits of first amendment protections, that would be the end of the argument. Instead, although the values that they and the *Roth* opinion identify are certainly important, and may be viewed as core values, the Amendment does protect other expression. Even expression that would otherwise be considered sexually obscene is unprotected only if “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>395</sup> In addition to the political value that might speak to the checking value or self-government, literature, art, and science enjoy protection, even in the context of sexual explicitness.

The Court in *Roth* itself recognized that first amendment protections extend beyond purely political speech. “All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon

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<sup>391</sup> *Id.*

<sup>392</sup> *Roth*, 354 U.S. at 485.

<sup>393</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>394</sup> See *infra* notes 458-64 and accompanying text.

<sup>395</sup> *Miller*, 413 U.S. at 24.

the limited area of more important interests.”<sup>396</sup> Nonetheless, the Court determined that obscenity is “utterly without redeeming social importance”<sup>397</sup> and as such is undeserving of the protections of the First Amendment.

The Court also quoted its opinion in *Chaplinsky v. New Hampshire*,<sup>398</sup> which had denied constitutional protection for fighting words. The *Roth* Court quoted dicta from *Chaplinsky* to the effect that:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . . .<sup>399</sup>

It may be difficult to determine the social value or importance of varying forms of speech or message. Although the distinction between political speech and non-political speech may be difficult only at the border, with some speech clearly political and some clearly non-political, it would appear to be more difficult to distinguish differing types of entertainment. Nonetheless, to the degree that the entertainment departs from core protected speech, the less protection it appears to merit.

Professor Schauer argues that sexual obscenity departs completely from the sphere of protected speech, that it is in fact nonspeech.<sup>400</sup> He discusses what he admits is “a hypothetical extreme example of what is commonly referred to as ‘hard core pornography.’”<sup>401</sup> The hypothetical ten-minute film is nothing but a close up of sexual organs engaged in intercourse, with “no variety, no dialogue, no music, no attempt at artistic depiction, and not even any view of the faces of the participants.”<sup>402</sup> The audience is assumed to be engaged in masturbation.

Schauer argues that:

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<sup>396</sup> *Roth*, 354 U.S. at 484 (footnote omitted).

<sup>397</sup> *Id.*

<sup>398</sup> 315 U.S. 568 (1942).

<sup>399</sup> *Roth*, 354 U.S. at 485 (quoting *Chaplinsky*, 315 U.S. at 571-72).

<sup>400</sup> SCHAUER, *supra* note 380, at 178-88.

<sup>401</sup> *Id.* at 181.

<sup>402</sup> *Id.*



[A]ny definition of "speech" (or any definition of the coverage of the concept of freedom of speech) that included this film in this setting is being bizarrely literal or formalistic. Here the vendor is selling a product for the purpose of inducing immediate sexual stimulation. There are virtually no differences in intent and effect from the sale of a plastic or vibrating sex aid, the sale of a body through prostitution, or the sex act itself. At its most extreme, hard core pornography is a sex aid, no more and no less, and the fact that there is no physical contact is only fortuitous.<sup>403</sup>

If pornography is simply a sex aid, it deserves, in Schauer's view, no protection.<sup>404</sup> It is to be treated the same as any physical device designed to stimulate. "The mere fact that in pornography the stimulating experience is initiated by visual rather than tactile means is irrelevant if every other aspect of the experience is the same. Neither involves communication in the way that language or pictures do."<sup>405</sup>

Schauer recognizes that serious literature also can evoke physical or quasi-physical arousal, as may art or music.<sup>406</sup> He also acknowledges that there are mental elements to physical sensations, including sexual arousal, but the simple existence of a mental element does not make for a communicative act.<sup>407</sup> Nonetheless, he says that this "misconceives the issue."<sup>408</sup>

It is not the presence of a physical effect that triggers the exclusion from coverage of that which would otherwise be covered by the principle of free speech. Rather, it is that some pornographic items contain *none* of the elements that would cause them to be covered in the first instance. The basis of the exclusion of hard core pornography from the coverage of the Free Speech Principle is not that it has a physical effect, *but that it has nothing else*.<sup>409</sup>

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<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> *Id.* at 182.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

Professor Schauer is certainly correct in noting that there is a mental element to pornography-caused sexual arousal. Although the final physical effect may be hormonal, the visual images must be processed by the brain before that effect can result. Although a physical stimulator does not require any higher level mental information processing for its effects, the mental element to pornography-based arousal is not sufficiently distinguishing.

The objection to including sexually obscene materials within the protections of freedom of speech appears to be that the brain is not its final audience or even a co-equal audience. Although music, art, and romantic literature may stimulate, they also communicate other messages aimed at the intellect. The brain is at least a co-equal audience. The position that the brain is a superior audience to the genitals seems reasonable.<sup>410</sup> It also seems reasonable, however, to conclude that the brain is a superior audience to the adrenals, and there is no reason to prefer either the genitals or the adrenals over the other. If material is violent enough to have a hormonal effect, Schauer's arguments would seem to carry over to exclude such material from the protections of the freedom of speech.

Schauer disagrees with this conclusion. He recognizes that violence might be considered obscene<sup>411</sup> but states:

[T]he arguments that relate to the exclusion of pornography from the coverage of the Free Speech Principle are inapplicable to violence as such. The sex-aid approach to hard core pornography that shows such pornography to be scarcely communicative at all does not appear relevant to the depiction of violence. Although it is possible that a refined categorization approach to freedom of speech might grant publications featuring violence for its own sake (such as a martial arts movie) less protection than would be granted to, say, political speech, this would create problems because of frequent use of violence to emphasize a moral or political argument, as, for example, with the use of vivid depictions of violent death in a motion picture intended to point out the horrors of war.<sup>412</sup>

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<sup>410</sup> Schauer's position has been characterized as arguing "that because pornography goes straight to the genitals without passing through intellectual processes it is better characterized as sex than speech." Deana Pollard, *Regulating Violent Pornography*, 43 VAND. L. REV. 125, 135-36 (1990).

<sup>411</sup> SCHAUER, *supra* note 380, at 179.

<sup>412</sup> *Id.* at 185.

His comparison is, however, not fairly made. In considering hard core pornography, Schauer hypothesized a film with absolutely no content other than close ups of sexual intercourse. There was no dialogue, no music, no artistic expression, and for Schauer, no communication. Yet, when he turns to a consideration of violence, he notes that violent depictions can be used to make political or moral points.<sup>413</sup> Although violent material can be so used, so can pornographic material.

It is because Schauer eliminated the possibility of any political or moral message from the film in his hypothetical that the argument has power. An equivalent hypothetical of a film consisting of nothing but a person being carved up with a chain saw, unaccompanied by music, dialogue or artistic expression would be just as lacking in political, moral, or any other message. It only would serve to stimulate a visceral reaction. The brain would not be the audience, and the material should not come within the scope of Schauer's Free Speech Principle. Just as pornographic material begins to enjoy protection as it departs from the hypothetical genre and starts to contain a message aimed at the intellect, so too might violent material enjoy the protections of the First Amendment to the degree that it departs from the hypothetical and contains political, moral, or other messages aimed at the intellect.

Another theory, one which seems to combine elements similar to both varieties discussed, has been developed by Professor Sunstein. He has set out factors that may be used to classify speech as "low value" and thus less entitled to protection:

First, the speech must be far afield from the central concern of the first amendment, which, broadly speaking, is effective popular control of public affairs. . . . Second, a distinction is drawn between cognitive and noncognitive aspects of speech. Speech that has purely noncognitive appeal will be entitled to less constitutional protection. Third, the purpose of the speaker is relevant: if a speaker is seeking to communicate a message, he will be treated more favorably than if he is not. Fourth, the various classes of low-value speech reflect judgements that in certain areas, government is unlikely to be acting for constitutionally impermissible reasons or producing constitutionally troublesome harms.<sup>414</sup>

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<sup>413</sup> *Id.*

<sup>414</sup> Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603-04.

For Sunstein, pornography, let alone sexual obscenity, is low value because it fails to express a position relevant to the popular control of government, the first factor, and the government is less likely to have acted for impermissible reasons or to cause a constitutionally troublesome harm, the fourth factor.<sup>415</sup> These two factors appear similar to the concern that speech relevant to self-governance has the highest value.

The second and third factors also dictate less protection for pornography. They seem somewhat akin to Professor Schauer's position that sexual obscenity is non-speech.<sup>416</sup> If material contains no message and is intended to contain no message, it might be viewed as noncommunicative. The scope of Sunstein's factors, however, may be wider than the areas falling outside of the protected areas under Schauer's analysis.

In his comments on Sunstein's factors, Professor Alexander indicates that all nonpropositional expression is unprotected and expresses concern that such a distinction leaves unprotected a Diego Rivera mural, literature, art, movies, and dance.<sup>417</sup> He claims that, although such material may convey ideas that could be presented as propositions, taken as a whole they are nonpropositional.<sup>418</sup> Even if one would want to consider art and music that conveys ideas that could be expressed as propositional to itself be propositional, that still would leave nonrepresentational art and music unprotected.

If Alexander's view is the proper reading of Sunstein, more material may be unprotected than would be under Schauer's analysis. Music and nonrepresentational art communicate emotive messages, even if they are nonpropositional. This affective communication is noncognitive and fails to meet Sunstein's second factor. It is not as clear that it fails Schauer's test. For Schauer, obscenity is unprotected because it has nothing other than a physical effect; the brain is not the audience. For music and art, the brain is the audience, even if the message is emotive.

The result, with regard to pornography, however, is the same for Sunstein as it is for Schauer. Sunstein says:

[M]ost pornography does not express a point of view on an issue of public importance, any more than does a prostitute or a rape or a sexual aid. In this respect, pornography is critically different from a misogynist tract, which consists of a direct appeal on an issue of public importance, one that

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<sup>415</sup> *Id.* at 606; see also Cass R. Sunstein, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555, 560 n.18 (1989).

<sup>416</sup> See *supra* notes 400-09 and accompanying text.

<sup>417</sup> Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 550 (1989).

<sup>418</sup> *Id.*

engages cognitive capacities. With respect to both value and harm, the fact that pornography is essentially a sexual aid substantially strengthens the case for regulation.<sup>419</sup>

The response is also the same. Violence does not, in itself, express a point of view on important issues; its effect is visceral and noncognitive. Although violence may be used in a work expressing a point of public importance, so may pornography. To the point the pornography has such serious value, it is less obscene. To the point the violent depiction has such content and such value, it too is less obscene. For each of the theories examined, the theory applies to violent obscenity as well as to sexual obscenity. Although one may agree or not with the theories, they provide no basis for distinguishing between explicit sex and explicit violence.

## VI. THE QUESTION OF VIOLENT EFFECTS

The policy issues already considered have been those underlying a more general theory for the freedoms of speech and press. The issue of violent effects is a policy issue, but it may be of a similar or different variety than those already discussed. Material that produces violent effects may be denied first amendment protection under a similar analysis. If the material is nothing but an invitation to violence, it may fit within the "fighting words" exception to the Amendment, established in *Chaplinsky v. New Hampshire*.<sup>420</sup>

Professors Lockhart and McClure, in a pre-*Roth* article, suggest that obscenity dicta in *Chaplinsky*<sup>421</sup> also should be read to exclude only obscenity that invites violence; it should be limited to expletives.<sup>422</sup> "The casual nature of the inclusion of 'lewd and obscene' along with libelous and insulting words is obvious. It seems likely that the Court was thinking here of 'lewd and obscene' talk of a conversational or

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<sup>419</sup> Sunstein, *supra* note 415, at 560 n.18; *see also* Sunstein, *supra* note 414, at 606. Sunstein does limit pornography to material that produces sexual arousal by depicting women as enjoying or deserving physical abuse. *Id.* at 592.

<sup>420</sup> 315 U.S. 568 (1942).

<sup>421</sup> *Id.* at 571-72.

<sup>422</sup> Lockhart & McClure, *supra* note 282, at 353. They cite several cases of which the Court may have been thinking: *Ricks v. State*, 28 S.E.2d 303 (Ga. App. 1943) ("Come here baby and kiss me, I am going to get into your pants."); *Dillard v. State*, 41 Ga. 278 (1870) (defendant asking a woman "to go to bed with him"); *People v. Casey*, 67 N.Y.S.2d 9 (N.Y. Crim. Ct. 1946) (soliciting sexual perversion); *State v. Payne*, 172 P. 1096 (Okla. Crim. 1918) (saying at a religious meeting "Will Jim Murphy make an affidavit that he didn't go out and catch a sexual disease and give it to his wife."); *see* Lockhart & McClure, *supra* note 282, at 353 n.381.

expletive, rather than literature.”<sup>423</sup> It was, for them, the tendency to incite violence that put such speech outside of the protection of the First Amendment. Obscene speech was unprotected only in such a context, an analysis that fit at least some of the early obscenity cases.<sup>424</sup> Violent speech would also be unprotected, if it represents nothing other than a call to violence.

The other sort of policy analysis would recognize that there is nothing in the general theory of first amendment protections that excludes the materials under consideration. That recognition does not, however, mean that the materials could never be banned. Finding that certain materials produce violent effects could, if they represent a clear and present danger of doing so, provide a basis for a ban on what would otherwise be protected speech. There has, for that reason, been a great deal of concern expressed over the possibility of pornography causing violence. The thesis of this section is that this concern has been misdirected at pornography. Although the issue of violent effects is extremely important, its focus should be on depictions of violence rather than on depictions of sex.

It is, as Professor Schauer has pointed out in yet another contribution to the field,<sup>425</sup> important to understand the variety of causation under consideration. Obviously, a claim that certain depictions cause violence is not to claim that every person exposed to such material commits acts of violence, nor that only such people commit such acts. The issue is, instead, one of probability and correlation. “The question . . . is whether, in a population in which every member was exposed to [the materials under consideration], would there be more instances of . . . violence than there would be in a population which had no exposure to such material?”<sup>426</sup>

There are several important studies and reports that attempt to answer questions of the variety Schauer proposes. The 1970 President’s Commission on Obscenity and Pornography examined sexually obscene material, without a focus on sexually violent obscenity or pornography. The Commission concluded:

[E]mpirical research . . . has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among

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<sup>423</sup> *Id.*

<sup>424</sup> See *supra* notes 249-54 and accompanying text.

<sup>425</sup> Frederick F. Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737.

<sup>426</sup> *Id.* at 754. The quote specifically concerns sexually violent materials and sexual violence, but the concept of causation is the same.

youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency.<sup>427</sup>

Donnerstein, Linz, and Penrod examined the experimental evidence on the question and agreed with the 1970 Commission that causation could not be shown.<sup>428</sup> They found the laboratory studies to be inconsistent, with male aggressiveness toward women increasing after exposure to pornography only when given multiple opportunities to aggress in the "permission-giving" situation of the laboratory.<sup>429</sup> One study in the Commission's research that did purport to show an increase in verbal aggression toward women after exposure to an erotic film, did so only when the male subjects were told that they would see another erotic film if they increased their verbal abuse.<sup>430</sup>

Donnerstein, Linz, and Penrod also examined research outside of the laboratory and found it "even less conclusive."<sup>431</sup> They noted a difference in studies on the comparison of rape rates as Denmark eliminated its antipornography laws. John Court claimed to find an increase in Denmark and a decrease where pornography restrictions were adopted,<sup>432</sup> while Kutchinsky showed no such rise.<sup>433</sup> Donnerstein, Linz, and Penrod suggest that Court's data is "basically uninterpretable" and that the Kutchinsky research is on a sounder methodological footing, though limited to Danish society.<sup>434</sup> Kutchinsky has been less charitable in his analysis of Court's work, pointing out various instances of the misuse or misreporting of statistics.<sup>435</sup> Kutchinsky also points to research reaching his conclusions, based on data from other countries.<sup>436</sup>

The Donnerstein, *et al.* analysis also suggests that at first glance there may seem to be a correlation between the circulation of sex magazines and rape rates in the individual states of the United States. They suggest

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<sup>427</sup> COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 27 (1970).

<sup>428</sup> ELLIOTT DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS 72 (1987).

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 51.

<sup>431</sup> *Id.* at 107.

<sup>432</sup> For an overview of John Court's results, see *id.* at 62-65.

<sup>433</sup> *Id.* at 61-62.

<sup>434</sup> *Id.* at 73.

<sup>435</sup> Bert Kutchinsky, *The Politics of Pornography Research*, 26 LAW & SOC'Y REV. 447 (1992).

<sup>436</sup> *Id.*

caution, however, in this conclusion.<sup>437</sup> The better explanation might be that both increase with the level of “hypermasculinity” in the states’ populations, as shown by the fact that the best relation to rape reports was the circulation of *Field and Stream* and *American Rifleman*.<sup>438</sup> In sum, they support the conclusion of the 1970 Commission that the evidence does not show that exposure to sexual obscenity leads to violence against women.

Just one year prior to the 1970 President’s Commission on Obscenity and Pornography’s inability to conclude that sexual obscenity leads to violence against women, the National Commission on the Causes and Prevention of Violence was able to find a link between television violence and violent behavior in viewers.<sup>439</sup> Years later, the National Institute of Mental Health concluded:

The consensus among most of the research community is that violence on television does lead to aggressive behavior by children and teenagers who watch the programs. This conclusion is based on laboratory experiments and on field studies. Not all children become aggressive, of course, but the correlations between violence and aggression are positive. In magnitude, television violence is as strongly correlated with aggressive behavior as any other behavioral variable that has been measured. . . .<sup>440</sup>

The Staff Report to the Commission was clear in its conclusions that mass media portrayals of violence have an effect on society. Among short term effects, the report concludes that:

[e]xposure to mass medial portrayals of violence stimulates violent behavior when—(a) Subjects are either calm or anxious prior to exposure, but more so when they are frustrated, insulted, or otherwise angered. (b) Aggressive or violent cues are presented (e.g., weapons of violence). (c) Subjects are exposed either to justified or unjustified violence, but more so when justified violence is portrayed.<sup>441</sup>

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<sup>437</sup> DONNERSTEIN ET AL., *supra* note 428, at 67.

<sup>438</sup> *Id.* at 66-68, 73.

<sup>439</sup> *Id.* at 118 (citing NATIONAL COMM’N ON THE CAUSES AND PREVENTION OF VIOLENCE (1969)).

<sup>440</sup> *Id.* at 118-19 (quoting NAT’L INST. MENTAL HEALTH, REPORT OF NAT’L INST. MENTAL HEALTH 6 (1982)).

<sup>441</sup> 9 ROBERT BAKER & SANDRA BALL, MASS MEDIA AND VIOLENCE: A REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 376 (1969).



The Report also found the following statements on long-term effects to be “consistent with and suggested by the research findings and by the most informed social science thinking”:

Exposure to mass media portrayals of violence over a long period of time socializes audiences into the norms, attitudes, and values for violence contained in those portrayals [as among other factors t]he primacy of the part played by violence in media presentations increases.

...

Persons who have been effectively socialized by mass media portrayals of violence will under a broad set of precipitating conditions, behave in accordance with the norms, attitudes, and values for violence contained in media presentations. Persons who have been effectively socialized into the norms for violence in the television world of violence would behave in the following manner: . . . They would probably resolve conflict by the use of violence[,] use violence as a means to obtain desired ends[,] use a weapon when engaging in violence[, and i]f they were policemen, they would be likely to meet violence with violence, often escalating its level.<sup>442</sup>

“[T]he general consensus seems to be that there is a positive, causal relationship between television violence and subsequent aggressive behavior.”<sup>443</sup>

Against the background of these reports, the 1986 Attorney General’s Commission on Pornography convened to consider anew the issues faced by the 1970 Commission. This time, in looking at violent effects, the 1986 Commission stressed violent pornography, which it believed to be increasingly the most prevalent form of pornography.<sup>444</sup> Although there may be some question whether the violent variety of pornography is becoming or has become the most prevalent form,<sup>445</sup> the question addressed is important.

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<sup>442</sup> *Id.* at 376-77.

<sup>443</sup> Donald Roberts & Christine Bachen, *Mass Communication Effects*, 32 ANN. REV. PSYCHOL. 307, 342 (1981).

<sup>444</sup> ATTORNEY GEN.’S COMM’N ON PORNOGRAPHY: FINAL REPORT 323 (1986) [hereinafter FINAL REPORT].

<sup>445</sup> See, e.g., Daniel Linz et al., *The Attorney General’s Commission on Pornography: The Gaps Between “Findings” and Facts*, 1987 AM. B. FOUND. RES. J. 713, 716.

The conclusion of the 1986 Commission was that "substantial exposure to sexually violent materials . . . bears a causal relationship to antisocial acts of sexual violence and, for some subgroups, to unlawful acts of sexual violence."<sup>446</sup> As Professor Schauer, who served on the 1986 Commission, points out, this conclusion is not inconsistent with the findings of the 1970 Commission.<sup>447</sup> The 1970 Commission considered sexually explicit materials generally, while the 1986 Commission focused on sexually violent materials. It would be a misreading of the 1986 Report to "make the unsupportable connection between sexual explicitness and sexual violence . . . ."<sup>448</sup>

Professor Schauer sums up the scientific evidence on the violent effects of sexually violent and sexually explicit depictions:

The results of these experiments, which try to exclude the spurious by first isolating sex without the violence and then isolating violence without the sex, indicate most importantly that the violence is clearly not spurious. That is, if the violence disappears and we are testing only for the relationship between sex and sexual violence, there is *no* causal relationship, as the Report expressly announces. But if the sexualization (and not just the sexual explicitness) of the violence is eliminated, the evidence indicates that the strength of the causal relationship diminishes. Thus, although the studies indicate some relationship between non-sexualized violence and attitudes about sexual violence, or aggressive tendencies toward women, this relationship, in probabilistic terms, becomes stronger when the sexualization is added.<sup>449</sup>

The studies in the area of media sex, media violence, and violent effects have been compiled and examined by Donnerstein, Linz, and Penrod.<sup>450</sup> The most telling of the studies presented is one by Donnerstein, Berkowitz, and Linz.<sup>451</sup> The subjects, male college students, were angered by one of the researchers. They then watched one of four films—aggressive

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<sup>446</sup> FINAL REPORT, *supra* note 444, at 326.

<sup>447</sup> Schauer, *supra* note 425, at 750.

<sup>448</sup> *Id.* at 758-59 n.49.

<sup>449</sup> *Id.* at 765 (footnotes omitted).

<sup>450</sup> DONNERSTEIN ET AL., *supra* note 428, at 108-36. For a more concise overview of the research and a discussion of Donnerstein, Linz, and Penrod's work, see Steven A. Childress, *Reel "Rape Speech": Violent Pornography and the Politics of Harm*, 25 LAW & SOC'Y REV. 177 (1991).

<sup>451</sup> DONNERSTEIN ET AL., *supra* note 428, at 110.

pornography, nonaggressive/noncoercive pornography, a film that depicted aggression against women but with no sexual content, and a neutral film. The subjects were then given the opportunity to aggress against one of the researchers' confederates. There were no differences in aggression against a female target between those who watched the sex-only film and those who watched the neutral film. Those who watched the aggression-only film were more aggressive against a female target than those who watched the sex-only film or the neutral film. Violence in a film was more likely to cause aggression than was sex.<sup>452</sup>

The authors do point out that the group most willing to aggress against the female target was the group that had seen the aggressive pornography.<sup>453</sup> Although it may be that violence, rather than sex, causes violence, violence with sex is the most violence-provoking. "[T]he sexual content of material is . . . relevant because the sexual content has a synergistic effect with violence that results in the greatest likelihood of harm."<sup>454</sup>

Donnerstein, Linz, and Penrod discuss desensitization to violence, and in that discussion, sex plays a role that could explain the synergistic effect. They suggest that:

if a film maker were to continually pair violent scenes with relaxing music, or continually pair violence with pleasing stimuli such as mildly erotic scenes, building from the least fearful scenes to a climax of great fearfulness, desensitization may occur very efficiently. The viewer would come to associate, through conditioning, the previously anxiety-provoking stimulus (violence) with the neutral or positive response elicited by neutral scene or a mildly erotic scene.<sup>455</sup>

Their description of "slasher films" fits this desensitization model.

The carnage is usually preceded by some sort of erotic prelude: footage of pretty young bodies in the shower, or teens changing into nighties for a slumber party, or anything that otherwise lulls the audience into a mildly sensual mood. When the killing begins, this eroticism is abruptly abandoned, for it has served its purpose, that of

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<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> Pollard, *supra* note 410, at 129.

<sup>455</sup> DONNERSTEIN ET AL., *supra* note 428, at 118.

lowering the viewer's defenses and heightening the films [sic] physical effectiveness. The speed and ease with [sic] one's feelings can be transformed from sensuality into viciousness may surprise even those quite conversant with links between sexual and violent urges.<sup>456</sup>

It then remains that violence is the culprit. Sex, explicit or not, is simply used to amplify the effect of that violence, to make the violence more acceptable by associating it with positively received sexual images. If violence is the true culprit, it makes more sense to ban material based on its violence than based on the level of sexual explicitness. "[T]he most reasonable conclusion that one can reach from the [1986] commission's own statement is that depictions of violence against women, whether in a sexually explicit context or not, should be the focus of concern."<sup>457</sup>

The only shortcoming of that conclusion is that it is too limited. The conclusion of the National Commission on the Causes and Prevention of Violence, that violence in media causes violence, was not limited to violence against women. Although the presence of sexual content with violence may focus against women any resulting violence and may increase the likelihood of violent effects, it is violence that causes violence and the victim of that violence may be either female or male.

## VII. WHAT SORT OF STATUTE?

*Miller v. California*<sup>458</sup> provides guidance in developing a statute banning excessively violent depictions. In setting the test for sexual obscenity, the Court in *Miller* stated that the question turned on

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>459</sup>

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<sup>456</sup> *Id.* at 114 (quoting Janet Maslin, *Bloodbaths Debase Movies and Audiences*, N.Y. TIMES, Nov. 21, 1982, § 2, at 1).

<sup>457</sup> Linz et al., *supra* note 445, at 721.

<sup>458</sup> 413 U.S. 15 (1973).

<sup>459</sup> *Id.* at 24 (citations omitted).

The test requires only minor changes to shift the focus from sex to violence.<sup>460</sup>

Part (a) of the *Miller* test may require no change. The *Roth* Court had defined "prurient" as "[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . . ."<sup>461</sup> and as "a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."<sup>462</sup> Parts of that definition can certainly carry over to violence. A depiction of violence can go beyond community standards and appeal to morbid longings, curiosity, or shameful or morbid interests, and thus appeal to the prurient interest. Since "prurient" seems to have developed an attachment to sexual activities, however, the best approach might be to substitute "morbid or shameful" for "prurient."

The second factor must change to reflect the concern with violence rather than sex. Rather than depicting sexual conduct, the test should be whether the work depicts or describes, in a patently offensive way, acts of violence specifically defined by the applicable state law. The state statute must indicate clearly which depictions are banned—murder, rape, aggravated assault, mayhem, and torture would all appear to be good candidates. Not all depictions of such acts would be banned, just as not all depictions of sexual acts are banned. Only depictions of sex and only depictions of violence that are patently offensive could be banned.

The third factor in *Miller* need not change at all. If the work, taken as a whole, lacks serious literary, artistic, political, or scientific value and meets the other factors, then it is violent obscenity. It is this factor that would protect the violence in Shakespeare from prosecution, even in a jurisdiction with an overzealous approach to banning violence.<sup>463</sup> As is true for sexual obscenity, the "serious value" prong should be judged on the basis of a reasonable person, and not a local values standard.<sup>464</sup>

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<sup>460</sup> Childress notes that only a two-word change in the usual obscenity test is required to include materials that are "patently offensive *violent* images which appeal to an unhealthy interest in *violence* and are without serious social value." Childress, *supra* note 450, at 204. Childress argues that the courts should not make such changes. *Id.* State statutes aimed at restricting access by minors to violent materials also have employed *Miller*-like definitions. See *supra* notes 26-32 and accompanying text.

<sup>461</sup> *Roth v. United States*, 354 U.S. 476, 487 n.20 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2d ed. 1949)).

<sup>462</sup> *Id.* (quoting MODEL PENAL CODE, § 207.10(2) (Tentative Draft No. 6, 1957)).

<sup>463</sup> The same factor could even justify public execution for its educational value, if it is assumed that the death penalty has a deterrent effect or educational value.

<sup>464</sup> See *Pope v. Illinois*, 481 U.S. 497 (1987).

The statute banning distributions of depictions of violence that was struck down in *Winters* was declared unconstitutional due to vagueness.<sup>465</sup> The definition of violent obscenity proposed here should not suffer the same fate, as it tracks the definition of sexual obscenity. With regard to concerns that the *Roth* definition of sexual obscenity was too vague, the Court said:

Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. "[T]he Constitution does not require impossible standards"; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . ." These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark . . . "boundaries sufficiently distinct for judges and juries fairly to administer the law" . . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . . .<sup>466</sup>

There is no reason why such an approach to vagueness should be applicable to sexual obscenity but inappropriate for violent obscenity.

There is another distinction between movies containing explicit sexual activity and movies containing explicit depictions of violence. Sexually explicit movies, at least those falling into the hard-core category, present film of actual sex acts. Violent movies, at least those from major producers, do not present film of actual violence but rather of simulated violence. That distinction, however, is insufficient to protect the violent film. The *Miller* opinion provided, as an example of what a state statute could define as obscene, under the second prong of the *Miller* test, "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, *actual or simulated*."<sup>467</sup> Statutes and case law agree that simulation or description can be obscene.<sup>468</sup>

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<sup>465</sup> See *supra* notes 213-21 and accompanying text.

<sup>466</sup> *Roth*, 354 U.S. at 491-92 (quoting *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)) (other citations and footnotes omitted).

<sup>467</sup> *Miller*, 413 U.S. at 25 (emphasis added).

<sup>468</sup> All non-pictorial obscene publications may be considered to be simulations.

Lastly, it should be noted that special statutes to protect youth from exposure to violent material may be required. Even if a particular depiction is not sufficiently offensive or does not appeal sufficiently to a morbid or shameful interest in violence in adults to be classified as violent obscenity as to adults, it still may be obscene as to youth. This difference also tracks the law for sexual obscenity. *Ginsberg v. New York*<sup>469</sup> allowed such bans for sexual material, and such a ban should carry over to violence. This is especially important, since research indicates that “[d]istinctions between fantasy and reality presentations of media violence are not consistently perceived by child audiences.”<sup>470</sup> Even cartoon depictions of violence appear to cause aggressive behavior in children.<sup>471</sup>

### VIII. CONCLUSION

In 1969, the National Commission on the Causes and Prevention of Violence found that media portrayals of violence can socialize viewers in a culture of violence.<sup>472</sup> Twenty-four years of that enculturation, an enculturation in which children see thousands of murders and 100,000 other acts of violence on television in their formative years, appear to have had the effects predicted. The vigor with which this problem can be attacked has been seen as limited by the protections of the First Amendment, but the Amendment should not be an obstacle. Obscenity is a recognized exception to the First Amendment. Although obscenity has been limited to depictions of sexual or excretory activities, that limitation is unfounded. Depictions of violence, even with no sexual content, properly may be considered obscene.

The history of obscenity law does not support a limitation to sexual obscenity. Obscenity was not well defined in the law until the late 1800s. At that time, in a constitutionally irrelevant era, obscenity began to focus on sex, but at the same time states passed laws against depictions of violence, sometimes continuing to call such depictions obscene. Violence as obscenity has as strong a legal history as sex as obscenity. Extra-legal concepts of obscenity also speak as well to violence as they do to sex.

Policy reasons for excluding sexual depictions from protected speech and press also apply as well, or better, to the exclusion of depictions of violence. Although sexual obscenity may be something less than true speech, so is violent obscenity. Although sexual obscenity may not go to

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<sup>469</sup> 390 U.S. 629 (1968).

<sup>470</sup> BAKER & BALL, *supra* note 441, at 377.

<sup>471</sup> Richard E. Goranson, *A Review of Recent Literature on Psychological Effects of Media Portrayals of Violence*, in BAKER & BALL, *supra* note 441, app. III-A at 395, 401.

<sup>472</sup> See *supra* notes 437-43 and accompanying text.

the self-government core of the First Amendment, neither does violent obscenity. Lastly, there is no indication that sexual obscenity causes violence, but there is evidence that violent obscenity can cause violence. Although that causation is even stronger, when combined with sex, it is the violence that causes violence.

Although there may be good arguments against censorship, those arguments have not carried the day. They were defeated in *Roth* and show no signs of renewed vitality. The Constitution, for better or worse, simply does not protect obscenity. What, however, is obscene? It has been the thesis of this Article that violence is what is truly obscene. A society in which sexual expression is limited, while violence runs rampant, does not seem a better place than a society in which depictions of violence are limited, and if the causation studies are correct, the level of violence is reduced. History, policy, and the Constitution do not demand that we accept a culture of violence. The explicit depiction of violence may be obscene and therefore unprotected by the First Amendment.



